

No. 93-1543-CFX
Status: GRANTED

Title: Christine McKennon, Petitioner
v.
Nashville Banner Publishing Company

Docketed:
March 30, 1994

Court: United States Court of Appeals for
the Sixth Circuit

Counsel for petitioner: Terry, Michael E.

Counsel for respondent: Wayland, Eddie

2-1-94 ext til 3-30-94, J. Stevens, CITED.

Entry	Date	Note	Proceedings and Orders
1	Feb 1 1994	G	Application (A93-635) to extend the time to file a petition for a writ of certiorari from February 13, 1994 to March 30, 1994, submitted to Justice Stevens.
2	Feb 1 1994		Application (A93-635) granted by Justice Stevens extending the time to file until March 30, 1994.
3	Mar 30 1994	G	Petition for writ of certiorari filed.
4	May 4 1994		DISTRIBUTED. May 20, 1994 (Page 2)
5	May 5 1994	G	Motion of American Association of Retired Persons, et al. for leave to file a brief as amici curiae filed.
6	May 5 1994	X	Brief of respondent Nashville Banner Publishing Company in opposition filed.
7	May 18 1994	X	Reply brief of petitioner filed.
8	May 23 1994		Motion of American Association of Retired Persons, et al. for leave to file a brief as amici curiae GRANTED.
9	May 23 1994		Petition GRANTED. *****
11	Jul 5 1994		Order extending time to file brief of petitioner on the merits until July 21, 1994.
12	Jul 12 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Jul 20 1994		Brief amici curiae of National Employment Lawyers Association, et al. filed.
13	Jul 21 1994		Joint appendix filed.
14	Jul 21 1994		Brief of petitioner Christine McKennon filed.
15	Jul 21 1994		Brief amici curiae of Women's Legal Defense Fund, et al. filed.
16	Jul 21 1994		Brief amicus curiae of AFL-CIO filed.
18	Jul 21 1994		Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
19	Jul 21 1994		Brief amici curiae of United States, et al. filed.
20	Aug 2 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Aug 9 1994		Order extending time to file brief of respondent on the merits until September 8, 1994.
23	Aug 17 1994		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 2, 1994. (1ST CASE).
24	Sep 8 1994		Brief of respondent Nashville Banner Publishing Company filed.
25	Sep 8 1994	G	Motion of Equal Employment Advisory Council, et al. for

Entry	Date	Note	Proceedings and Orders
26	Sep 8 1994	G	leave to file a brief as amici curiae filed. Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
27	Sep 9 1994		CIRCULATED.
28	Sep 21 1994		Letter from counsel including the Wallace decision received and distributed.
31	Oct 7 1994	P	Application (A93-1543) to extend the time to file a reply brief from October 11, 1994 to October 14, 1994, submitted to Justice Stevens.
32	Oct 7 1994	G	Application (A94-244) to extend the time to file a reply brief from October 11, 1994 to October 14, 1994, submitted to Justice Stevens.
29	Oct 11 1994		Motion of Equal Employment Advisory Council, et al. for leave to file a brief as amici curiae GRANTED.
30	Oct 11 1994		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
33	Oct 11 1994		Application (A94-244) granted by Justice Stevens extending the time to file until October 14, 1994.
34	Oct 14 1994	X	Reply brief of petitioner filed.
35	Oct 19 1994		Record filed.
		*	Original record proceedings United States District Court for the Middle District of Tennessee (BOX)
36	Oct 24 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Sixth Circuit.
37	Nov 2 1994		ARGUED.
38	Dec 6 1994		Letter from counsel for the respondent received and distributed.

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No. 93-

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHRISTINE MCKENNON,*Petitioner,*

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee who is dismissed in violation of the Age Discrimination in Employment Act is barred from obtaining any remedy if, solely as a result of the unlawful dismissal and the litigation challenging it, the employer discovers another basis for dismissal, a question previously accepted for review by the Court in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993)

PARTIES

All of the parties who participated below are set out in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. The Proceedings Below	3
B. Statement of Facts	4
REASONS FOR GRANTING THE WRIT	7
<p>THIS CASE RAISES AN IMPORTANT ISSUE REGARDING THE INTERPRETATION OF THE ANTI-DISCRIMINATION IN EMPLOYMENT STATUTES CONCERNING WHICH THERE IS A CONFLICT BETWEEN THE CIRCUITS ... 7</p>	
CONCLUSION	11
APPENDIX OF DECISIONS BELOW	

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
ABF Freight System, Inc. v. National Labor Relations Board, 510 U.S. ___, 127 L. Ed. 2d 152 (1994)	10
Kristufek v. Hussmenn Foodservice Co., 985 F.2d 364 (7th Cir. 1993)	9
Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993)	9
Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), <i>cert. granted</i> , ___ U.S. ___, 125 L. Ed. 2d 686 <i>cert. dismissed</i> , 125 L. Ed. 2d 773 (1993) <i>passim</i>	
Moodie v. Federal Reserve Bank of New York, 831 F. Supp. 333 (S.D.N.Y. 1993)	9
O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, appeal pending No. 92-15625	9
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	8, 11
Redd v. Fisher Controls, 814 F. Supp. 547 (W.D. Tex. 1992)	9
Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993)	9
Summers v. State Farm Insurance, 864 F.2d 700 (10th Cir. 1988)	8, 9

Pages:

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	10
Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992)	8
<i>Statutes:</i>	<i>Pages:</i>
28 U.S.C. §1254(1)	2
29 U.S.C. § 621	2, 3
29 U.S.C. § 623	2, 3
Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, et seq.	3
<i>Miscellaneous:</i>	<i>Pages:</i>
<i>Attorneys Still Looking for Answers on Effect of Misconduct in Bias Cases,</i> 2 BNA Employment Discrimination Report, p. 273 (March 2, 1994)	10

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v.

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**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Christine McKennon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 15, 1993.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 9 F.3d 539, and is set out at pp. 1a-9a of the Appendix hereto ("App."). The opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, is reported at 797 F.Supp. 604, and is set out at pp. 10a-18a of the Appendix.

JURISDICTION

The decision of the Sixth Circuit was entered on November 15, 1993. An extension of time until March 30, 1994, for filing this petition was granted by Justice Stevens.¹ Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which provides in pertinent part as follows:

§ 623. Prohibition of age discrimination

(a) **Employer practices.** It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this [Act].

¹Docket Number 93-300635.

STATEMENT OF THE CASE

A. The Proceedings Below

This action was filed by petitioner, Christine McKennon, in the United States District Court for the Middle District of Tennessee on May 6, 1991. The complaint alleges that Ms. McKennon was discharged from her employment because of her age, in violation of the Age Discrimination in Employment Act [ADEA], 29 U.S.C. § 621, *et seq.*, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq.* App. 11a.

Following discovery, the defendant, Nashville Banner Publishing Co., respondent here, filed a motion for summary judgment based on evidence obtained during discovery. App. 12a. For the purpose of the motion, the defendant and the courts below assumed that petitioner had been the victim of age discrimination in violation of the ADEA. App. 3a.

The district court granted the motion based on the "after-acquired evidence" doctrine that governs in the Sixth Circuit. Petitioner was precluded from any recovery, even if she had in fact been subjected to age discrimination. The court rejected petitioner's argument she should be given a chance to establish at trial that her copying and removing documents was not such misconduct as to justify her termination.

On appeal, the Sixth Circuit affirmed, rejecting arguments that the "after-acquired evidence" doctrine should not be applied in cases (1) where the alleged misconduct only happened because of the employer's discriminatory action and (2) where the alleged misconduct occurred during employment rather than where there was employment application fraud. In its decision, the Sixth Circuit specifically relied upon its earlier decision in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir.

1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993). This petition for a writ of certiorari follows.

B. Statement of Facts

Since the district court granted summary judgment in favor of the defendant, the facts below must be viewed in the light most favorable to the plaintiff. Petitioner was employed by respondent since May, 1951, and held a variety of positions. At all times, her performance was consistently rated as excellent. Her employment was terminated on October 31, 1990, when she was sixty-two years old. App. 10a-11a.

For more than a year prior to her termination, petitioner began to experience a pattern of conduct designed to force her resignation and/or retirement. For example, petitioner's parking privileges were altered, her lunch hour privileges modified, and she was denied an appropriate pay raise. Furthermore, the newspaper's Comptroller (petitioner's immediate supervisor) began to suggest retirement. Petitioner was informed that the newspaper's finances were precarious and terminations were necessary and imminent.

In April, 1990, the Comptroller informed petitioner that the Publisher had requested a memorandum regarding petitioner's "retirement plans." Petitioner responded to the Comptroller that she did not seek retirement and was not interested in retirement options. Nevertheless, the Comptroller independently made written inquiry to the newspaper's pension administrators, and presented the information to petitioner.

Shortly thereafter, petitioner, certain she was going to lose her job, took certain documents² home and shared them with her husband of thirty-six years. Petitioner did not share the information with any individual other than husband. Several months later, on October 31, 1990, petitioner was summarily terminated, without notice. The only explanation given for her termination was "staff reduction."³

During the course of petitioner's deposition on December 18, 1991, after suit was filed, she admitted to copying the documents, removing the documents from the company's premises, and sharing the information with her husband. Petitioner claimed that she had copied and removed the documents because of her concern that she was going to be terminated and she wanted them "in an attempt to learn information regarding my job security concerns." App. 12a.

On December 20, 1991, the company sent her a post-termination letter of termination allegedly based on the discovery that she had copied and removed these documents. App. 12a. Petitioner disputed that her copying and removal of the documents constituted such misconduct that would justify application of the after-acquired evidence defense. She also urged that her actions were justified for her own protection. Therefore, she argued, these questions should be left to the jury. App. 12a-13a.

²The documents were one executive employment-severance agreement and four pages of newspaper financial information. All of this information was maintained or possessed by petitioner in the normal course of her job. Thus, the information was already known to her. Therefore, the alleged wrongful conduct was removing the documents and sharing the information with her husband.

³The staff reduction included the termination of the two oldest secretaries. Two days before, on October 29, 1990, the Banner hired a 26-year-old secretary.

The district court, however, held that these questions were not material; rather, it found that petitioner's copying and removal of the confidential documents constituted misconduct in violation of her obligations as a confidential secretary. App. 13a. The court further found, based solely on conclusory affidavits from four management employees⁴ of the company, that petitioner would have been terminated from employment had her misconduct been learned of at any time prior to her discharge on October 31, 1990. App. 16a. The court also held that the copying and removal of the documents was not conduct protected by 29 U.S.C. § 623(d), the "opposition clause" of the ADEA.⁵ The Court of Appeals affirmed, based on its prior decisions applying the "after-acquired evidence" doctrine.

⁴The record shows that the affidavits were all drafted by the Banner's attorney. When the publisher executed his affidavit he had not reviewed petitioner's 38 year-long personnel file and did not know what documents she had copied. Furthermore, the respondent introduced no evidence of a company rule that prohibited petitioner's conduct, or that anyone else had ever been terminated for a similar infraction.

⁵29 U.S.C. § 623(d) provides:

(d) **Opposition to unlawful practices; participation in investigations, proceedings, or litigation.** It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this [Act].

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES AN IMPORTANT ISSUE REGARDING THE INTERPRETATION OF THE ANTI-DISCRIMINATION IN EMPLOYMENT STATUTES CONCERNING WHICH THERE IS A CONFLICT BETWEEN THE CIRCUITS.

This case presents precisely the same issue on which this Court granted certiorari in the case of *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, ___ U.S. ___, 125 L.Ed.2d 686, cert. dismissed, 125 L.Ed.2d 773 (1993). Certiorari was dismissed in that case solely because the parties reached a settlement. The issue presented in *Milligan-Jensen* and the present case remains a recurrent and vitally important question about which the circuits are irreconcilably in conflict.⁶

The "after-acquired evidence" doctrine deals with evidence that the employer discovers after the challenged employment decision was made, and which the employer alleges would (if known) provide a non-discriminatory basis for adverse employment action. The evidence is usually, as in this case, discovered only as a direct result of the filing of a claim of employment discrimination. Some circuits have held that "after-acquired evidence" totally bars the

⁶The instant case presents facts that are arguably more compelling than *Milligan-Jensen*. First, here the wrongful conduct was caused by the discrimination and petitioner's efforts to protect herself from it. Second, *Milligan-Jensen* involved application fraud where the employer could argue that the employee was not qualified for the job and would never have been hired pursuant to neutral and objective criteria. The instant case involves nearly forty years of employment by a qualified and excellent employee. Yet, the employer is allowed to avoid liability by essentially a discretionary, post-litigation decision to terminate.

employee's claim. That is, it defeats any liability and all relief under the statute. Other circuits, however, have held that such evidence is relevant only in determining whether the relief for the employer's discriminatory action should be limited in that reinstatement would be inappropriate or back pay cut off.

The Sixth and the Tenth Circuits have held that after-acquired evidence is a basis for absolving an employer of any liability for discriminatory practices. *Summers v. State Farm Insurance*, 864 F.2d 700 (10th Cir. 1988);⁷ *Milligan-Jensen v. Michigan Technological Univ.*, *supra*.⁸ The present case applies the Sixth Circuit's "after-acquired evidence" doctrine to an action brought under the ADEA.

The Eleventh Circuit, on the other hand, has held that an employer is liable under the same circumstances. *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992). *Wallace* expressly rejected the reasoning of the Tenth Circuit,⁹ and held that an employer may escape a finding of liability only by showing that it had relied on a nondiscriminatory reason at the time of the employment decision, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). 968 F.2d at 1180-81. Thus, "after-acquired evidence" cannot defeat liability, but may limit the relief available in

⁷ "... while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury' and does itself preclude the grant of any present relief or remedy to Summers." 864 F.2d at 708.

⁸ "This circuit ... has committed itself to the *Summers* rule. . . . [I]f the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damage by being fired." 975 F.2d at 304-05.

⁹ "... we reject the *Summers* rule that after-acquired evidence may effectively provide an affirmative defense to Title VII liability." 968 F.2d at 1181.

that reinstatement may be precluded and backpay available only to the date that the employer demonstrates that the new evidence would have been discovered in the absence of the litigation. 968 at 1182-83.

The Seventh Circuit has taken a third and intermediate position on this issue. Thus, newly discovered evidence that shows that the employee had made misrepresentations on his or her employment application will not defeat liability unless the misrepresentation is related to a critical job element. Further, in the Seventh Circuit back pay is cut off as of the date the after-acquired evidence was in fact discovered. *Kristufek v. Hussmenn Foodservice Co.*, 985 F.2d 364, 369-70 (7th Cir. 1993).

As the United States and the Equal Employment Opportunity Commission pointed out in their brief as amici curiae in support of the grant of certiorari in *Milligan-Jensen*, there has been a proliferation of cases "in which employers offer 'after-acquired evidence' to defend their discriminatory actions" and that the defense has "broadly destructive impact . . . on nondiscrimination goals." Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p. 11, citing, *inter alia*, the present case as one of "many recent cases in which the 'after-acquired evidence' defense has been raised." *Id.*, n.4.¹⁰

¹⁰ The issue is currently pending in the Fourth Circuit in *Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D. Va. 1993), appeal pending Nos. 93-1895 & 93-2078 and in the Ninth Circuit in *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal pending No. 92-15625. District courts in the Fifth Circuit have adopted the no recovery rule of the Sixth and Tenth Circuits. See, e.g., *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992). District courts in the Second and Third Circuits, on the other hand, have rejected *Summers* and have followed the Eleventh Circuit's decision in *Wallace*. See, e.g., *Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333 (S.D.N.Y. 1993); *Massev v. Trump's Castle*

The impact of the "after-acquired evidence" doctrine on the rights of Title VII and ADEA claimants can be significant because of the manner in which the lower courts have generally enforced the doctrine. For example, if the Banner had discovered Ms. McKennon's allegedly wrongful conduct before October 31, 1990, and had fired her for removing the documents, then she could have filed an ADEA claim, alleged that the Banner's reason was a pretext for age discrimination, and had a jury trial on the issue. In the typical "after-acquired evidence" case, however, the employer can avoid the jury and obtain summary judgment with self-serving affidavits supporting a post-litigation termination. This result subverts this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which depends on plaintiffs having "a full and fair opportunity to demonstrate pretext." 450 U.S. at 256. Such a result is not justified, since both situations present equally difficult questions of fact that deserve full exploration.

In addition, the importance of the issue is demonstrated by this Court's recent decision in *ABF Freight System, Inc. v. National Labor Relations Board*, 510 U.S. ___, 127 L.Ed.2d 152 (1994), which deals with a related question. There, this Court upheld the NLRB's discretion to grant full relief for a violation of the National Labor Relations Act even though the employee had given a false reason for being late to work and had repeated that falsehood in testimony under oath in a formal proceeding before a NLRB Administrative Law Judge. There has been substantial dispute and speculation as to the impact and relevance of the decision in *ABF Freight System* to the "after-acquired evidence" issue in employment discrimination cases. See "Attorneys Still Looking for Answers on Effect of Misconduct in Bias Cases," 2 *BNA Employment Discrimination Report*, p. 273 (March 2, 1994).

Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993).

Petitioner urges that the approach of the Eleventh Circuit is correct and should be adopted by this Court. "After-acquired evidence" cannot absolve an employer of discriminatory action, although it may affect the remedy to be granted the employee. This rule would be consistent with the decision of this Court in *Price Waterhouse v. Hopkins*, *supra*, and with section 107 of the Civil Rights Act of 1991, which provides that if a reason for an employment decision violates Title VII, then there is liability under the statute; only the remedy is affected if there is another, legal reason for the action. As the United States has pointed out, the "after-acquired evidence" doctrine of the Sixth and Tenth Circuits, as applied in this case, is "an unwarranted obstruction to proper and effective enforcement of the nondiscrimination requirements" of the civil rights statutes, and should be rejected.¹¹

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

¹¹Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p. 11-12.

Respectfully submitted,

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APPENDIX

1a

No. 92-5917

United States Court of Appeals,
Sixth Circuit

CHRISTINE McKENNON,

Plaintiff-Appellant,

v.

NASHVILLE BANNER PUBLISHING COMPANY,

Defendant-Appellee.

Decided Nov. 15, 1993

Before: KENNEDY and RYAN, Circuit Judges; and
BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge

In this age discrimination suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, the plaintiff, Christine McKennon, appeals the district court's grant of summary judgment in favor of defendant Nashville Banner Publishing Co. ("the Nashville Banner" or "the Banner"). The Equal Employment Opportunity Commission filed an *amicus curiae* brief in support of Mrs. McKennon, and the Equal Employment Advisory Council filed one in support of the Nashville banner.

The plaintiff claims that the Nashville Banner violated her rights by discharging her at the age of sixty-two on the basis of age and that the district court misapplied the "after-acquired evidence" doctrine by allowing evidence of

certain misconduct during her employment, discovered by the Banner *after* her termination, to negate her claim. See *McKennon v. Nashville Banner Publishing Co.* 797 F.Supp. 604 (M.D. Tenn. 1992). Because we determine the district court properly applied the after-acquired evidence doctrine to the facts of this case, we AFFIRM the district court's grant of summary judgment.

I

The Nashville Banner employed Mrs. McKennon from May 1951 to October 31, 1990, when she was terminated. Mrs. McKennon worked primarily as a secretary, and over the years the company consistently evaluated her work performance as excellent. On May 6, 1991, Mrs. McKennon filed suit claiming age discrimination. While deposing her in December 1991, the Nashville Banner discovered Mrs. McKennon had, while employed as secretary to the Comptroller, Ms. Stoneking, copied and removed from the newspaper's premises several confidential documents to which she had access as such secretary. She took the documents home and showed them to her husband.¹ Mrs. McKennon asserted she copied the documents "in an attempt to learn information regarding my job security concerns" and for her "insurance" and "protection." As a result, the Banner sent Mrs. McKennon a "termination letter" in December 1991, asserting it would have terminated her immediately during her employment if it had known of her acts. It is undisputed, from the testimony of Banner executives, that the Banner would have discharged Mrs. McKennon when she took and copied the

¹ The documents included: Nashville Banner Fiscal period Payroll Ledger dated 9/30/89; Nashville Banner Publishing Co., Inc., Profit and Loss Statement dated 10/30/89; a note from Elise McMillan to Simpkins; a memorandum from Imogene Stoneking to Irby C. Simpkins, Jr., dated 2/3/89; a handwritten note dated 2/8; and an Agreement between the Banner and one of its managing employees, notarized 3/1/89.

records if it had then known that she had done so.

The Banner's summary judgment motion assumed, for purposes of the motion, that it would be liable to Mrs. McKennon under the ADEA in discharging her for age discrimination² but for the undisputed fact that, before she was discharged, Mrs. McKennon was guilty of conduct which, if known by the Banner, would have caused her discharge.³ The district court, in granting summary judgment, agreed with this proposition. It determined that, because it was undisputed that Mrs. McKennon was guilty of misconduct, prior to her discharge, that would, if known by the Banner, have caused her discharge, the Banner was entitled to summary judgment. The district court concluded that this result must follow because Mrs. McKennon did not suffer injury from the claimed violation. *McKennon*, 797 F.Supp. at 608.

Mrs. McKennon contends on appeal that the after-acquired evidence rule should not apply to defeat her age discrimination claim. She argues that her situation is distinct from other cases involving after-acquired evidence because her action concerns employee misconduct during employment rather than employment application fraud and also because a nexus exists between her wrongful conduct

² The summary judgment record contains substantial deposition testimony of Mrs. McKennon that she was indeed discharged because of age. This contention, however, is disputed by other testimony.

³ Several officers of the banner have sworn in affidavits that Mrs. McKennon would have been discharged for such conduct, and McKennon testified at one point in her deposition that she would have been terminated for this conduct. There, then, is no substantial issue here. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986).

and her discrimination claim.⁴

II

This court reviews the district court's grant of summary judgment *de novo*, making all reasonable inferences in favor of the non-moving party: *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

III

We first address in this case the question whether the district court erred in granting summary judgment for the Nashville Banner based on after-acquired, undisputed evidence of Mrs. McKennon's misconduct in copying and removing confidential files and that she would have been discharged for such conduct. More specifically, the issue is whether the after-acquired evidence doctrine applies exclusively to cases of employment application fraud or whether it also applies, as here, to cases of employee misconduct during employment.

The seminal case establishing the after-acquired evidence doctrine in employment discrimination cases is *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). The doctrine mandates judgment as a matter of law for an employer charged with discrimination if evidence of the plaintiff employee's misconduct surfaces at some time after the termination of the employee, and the employer can prove it would have fired the employee on the

⁴ As we understand the appellant's "nexus" argument, it is that her improper taking of the records cannot be a basis for a denial of her claim under the ADEA because she took the records to give her a basis to contest her expected discharge because of her age.

basis of the misconduct if it had known of it. In *Summers*, the employee claimed he was fired on the basis of his age and race, in violation of the ADEA and Title VII. Four years after the discharge, while preparing for trial, the employer discovered evidence that the employee falsified records in 150 instances.⁵ The Tenth Circuit affirmed summary judgment for the employer, reasoning that while the after-acquired evidence could not have been the actual cause of the employee's discharge, it was relevant and determinative as to the employee's claim of injury, and precluded the grant of any relief or remedy. *Id.* at 708.

This circuit adopted the *Summers* after-acquired evidence rule in *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409 (6th Cir. 1992), a diversity action under Michigan law. In *Johnson*, the plaintiff sued her former employer alleging that she was discharged in violation of Michigan's Elliott-Larsen Civil Rights Act. During discovery, the employer learned that the plaintiff had misrepresented her educational background on her employment application, for example, claiming to have a bachelor's degree when in fact she did not. The court held that:

on these facts, even if we assume that Honeywell discharged Johnson in retaliation for her opposition to violations of the Act, she is not entitled to relief. Because Honeywell established that it would not have hired Johnson and that it would have fired her had it become aware of her resume fraud during her employment, Johnson is entitled to no relief, even if she could prove a violation of Elliott-Larsen.

⁵ The employer was also aware *during* Summer's employment that he had falsified some company records. The company placed him on probationary status for two weeks and warned him never again to falsify company records, but he did not heed that advice. 864 F.2d at 702.

Id. at 415. The *Johnson* court noted, however, that evidence of an employee's resume fraud "must establish valid and legitimate reasons for the termination of employment." *Id.* at 414.

We reiterated our commitment to the *Summers* after-acquired evidence rule in *Milligan-Jensen v. Michigan Technological Univ.* 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2991, 125 L.Ed.2d 686, *cert. dismissed*, ___ U.S. ___, 114 S.Ct. 22, 125 L.Ed.2d 773 (1993). In *Milligan-Jensen*, the plaintiff produced evidence that her employer violated Title VII by discriminating against her on the basis of her sex. After the employee's discharge, however, the defendant discovered the employee had omitted a DUI conviction from her employment application. We held that this omission was material and explained that because the plaintiff's falsification, "if discovered during her employment, would have resulted in [her] termination, it becomes irrelevant whether or not she was discriminated against...." *Id.* at 305. The Supreme Court granted *certiorari* to review this case, but dismissed it after the parties settled. Thus, in *Johnson* and *Milligan-Jensen*, we have firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence.⁶

⁶ See also *Paglio v. Chagrin Valley Hunt Club Corp.*, 966 F.2d 1453, 1453 (6th Cir. 1992) (unpublished) ("even if the Club was motivated to discharge Paglio because of his age, the misuse of Club funds discovered after Paglio's retirement provided an independent basis for termination."); *Dotson v. United States Postal Serv.*, 977 F.2d 976, 978 (6th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 263, 121 L.Ed.2d 193 (1992) ("Even though plaintiff's failure to complete the application truthfully was discovered post-termination, he is not entitled to handicap discrimination relief when he was not initially qualified for the position."); *Baab v. AMR Services Corp.*, 811 F.Supp. 1246 (N.D. Ohio 1993) (interpreting Ohio law and holding former
(continued...)

Moreover, the *Summers* case, from which this circuit adopted the after-acquired evidence rule, did not involve resume fraud, but like this case involved evidence of employee misconduct. In *Summers*, the plaintiff falsified company records more than 150 times. 864 F.2d at 703.

Finally, we agree with a district court which recently applied the after-acquired evidence doctrine in a factually similar situation. *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466 (D. Ariz. 1992). In *O'Day*, a former employee who alleged he was discriminated against under the ADEA surreptitiously removed his confidential personnel file, photocopied portions of the file, and showed some of the material to a co-worker. *Id.* at 1467. The court noted that the issue of whether an employer would actually fire an employee for misconduct could generate a genuine issue of material fact in some cases. Citing an employee handbook and an affidavit by a company official indicating that the plaintiff would have been immediately fired for his conduct, however, the court determined there was no question the employer would have fired the plaintiff and the employer was therefore entitled to summary judgment. *Id.*

⁶(...continued)

employee's state discriminatory discharge claims were barred by after-acquired evidence of employee's misstatements on employment application); *Bray v. Forest Pharmaceuticals, Inc.*, 812 F.Supp. 115, 117 (S.D. Ohio 1993) ("as the Defendant has shown that the misrepresentations or omissions [on former employee's application] were material, were relied upon by the employer in making its decisions, and are clearly directly related to measuring the candidate for this type of employment, the post-discharge discovery of falsification renders summary judgment appropriate in this case."); and *Benson v. Quanex Corp.*, 1992 WL 63013 (E.D. Mich. 1992) (unpublished) (granting summary judgment to employer in racial harassment and constructive discharge action under Michigan Elliott-Larsen Civil Rights Act because the employer showed it would not have hired the employee had it known of the employee's prior felony conviction and incarceration).

at 1468-70. Similarly, statements of the Banner officials that McKennon would have been fired had the newspaper known she had removed confidential documents support summary judgment in favor of the Banner.

IV

We next turn to whether the after-acquired evidence doctrine applies to cases where there is an alleged nexus between the employee's misconduct and the discrimination claim. Mrs. McKennon claims she copied and removed the confidential documents only because she feared for her job and thus her conduct was justified. We thus understand her contention to be that, if the Banner should discharge her, she would have a lever with which to resist that action. We find that such an alleged nexus is irrelevant to the application of the after-acquired evidence doctrine.⁷ The

⁷ Of course, if the employee's "misconduct" falls into the category of protected activities set forth in the "opposition clause" to the ADEA, 29 U.S.C. § 623(d), the employer could not avoid liability for discriminatory actions based upon the employee's conduct. Under § 623(d),

Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

See Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) (holding plaintiff employee's copying of confidential documents interfered with the employer's interest in maintaining the confidentiality of employee records, and thus was not protected conduct); and *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466, 1470 (D. Ariz. 1992) (holding "no reasonable jury (continued...)")

sole issue in after-acquired evidence cases is whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct. *See Milligan-Jensen*, 975 F.2d at 304-305.⁸

V

For the aforementioned reasons, we AFFIRM the district court's grant of summary judgment for the defendant.

⁷(...continued)

would find that O'Day's conduct, surreptitiously removing confidential management files from his supervisor's desk, photocopying them, and showing the file to a co-worker, was reasonable in light of the circumstances."). Copying and removing confidential documents is clearly not protected conduct.

⁸ We note, incidentally, that if Mrs. McKennon's nexus theory were adopted, it would apply where an employee takes money from her employer for support of herself in anticipation of an unlawful discharge.

No. 3-91-0346

United States District Court
M.D. Tennessee
Nashville Division

CHRISTINE McKENNON,

v.

THE NASHVILLE BANNER PUBLISHING
COMPANY.

Decided June 3, 1992

MEMORANDUM

HIGGINS, District Judge.

The Court has before it the motion for summary judgment of the defendant, Nashville Banner Publishing Co., Inc. (filed January 7, 1992; Docket Entry No. 7), and the response thereto by the plaintiff Christine McKennon (filed March 16, 1992; Docket Entry No. 25). For the reasons discussed below, the Court grants the motion for summary judgment of the Banner.

I.

Mrs. McKennon was employed by the Banner in May 1951, initially as an ad taker, subsequently as a secretary for six different individuals. In each of these positions, Mrs. McKennon was evaluated and her performance was consistently rated as excellent. From February 26, 1982, until March 6, 1989, Mrs. McKennon held the position of secretary to Jack Gunter, Executive Vice President. In 1989, Mr. Gunter's job assignment changed, and Mrs. McKennon was reassigned as secretary to Imogene Stoneking, Comptroller. In this position, her duties included

maintaining personnel files, working on preparation of the annual budget, maintaining petty cash vouchers for expense reimbursements, processing time sheets, making travel arrangements, directing the personnel department regarding employee changes, and other duties, including miscellaneous tasks assigned directly by Ms. Stoneking. Complaint at 3 (filed May 6, 1991; Docket Entry No. 1).

Mrs. McKennon was an employee at will. Either party could terminate the employment relationship at any time. Acknowledgement of receipt of Nashville Banner employee handbook, dated February 28, 1990, appendix A to the Banner's memorandum to support motion for summary judgment (filed January 7, 1992; Docket Entry No. 8). Mrs. McKennon's employment was terminated on October 31, 1990, at which time she was sixty-two years old. According to the Banner, its need to reduce the size of its work force led to the decision to terminate her employment. She filed this lawsuit on May 6, 1991, alleging age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, and the Tennessee Human Rights Act (THRA) Tenn. Code Ann. § 4-21-101 *se seq.*

During the course of Mrs. McKennon's deposition on December 18, 1991, the Banner discovered that when Mrs. McKennon was a secretary to Ms. Stoneking, she copied and removed from the Banner's premises the following confidential documents: Nashville Banner Fiscal Period Payroll Ledger dated 9/30/89; Nashville Banner Publishing Co. Inc., Profit and Loss Statement dated 10/30/89; a note from Elise to Simpkins; a memorandum from Imogene Stoneking to Irby C. Simpkins, Jr., dated 2/3/89; a handwritten note dated 2/8; and an Agreement between the Banner and one of its managing employees (notarized 3/1/89). Memorandum in support of defendant's motion for summary judgment, appendices D, F, H (filed January 7, 1992; Docket Entry No. 8). She took them home and showed them to her husband. Defendant's statement of

undisputed facts at paras. 7-9 (filed January 7, 1992; Docket Entry No. 9). Mrs. McKennon argues that she copied and removed the documents for her "insurance" and "protection," "in an attempt to learn information regarding my job security concerns." Deposition of Christine McKennon taken December 18, 1991, at 241 (filed April 10, 1992; Docket Entry No. 39); affidavit of Christine McKennon at para. 12 (filed March 16, 1992; Docket Entry No. 28). As a result of this discovery, the Banner sent her a letter of termination on December 20, 1991. Exhibit A to appendix I of memorandum in support of defendant's motion for summary judgment.

On January 7, 1992 the Banner filed its motion for summary judgment based on the after-acquired evidence doctrine. Mrs. McKennon argues that the doctrine is inapplicable in the instant case and therefore summary judgment is improper.

II.

The Court has subject matter jurisdiction over Mrs. McKennon's ADEA claim under 28 U.S.C. § 1331, the federal question statute. The Court has pendent jurisdiction over Mrs. McKennon's claim under the THRA.

A.

Summary Judgment Standard

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The parties do not dispute the duration and nature of Mrs. McKennon's employment with the Banner; nor do they dispute that she copied and removed confidential materials from the Banner's premises without permission. There is an apparent dispute, however, about the dates Mrs. McKennon took the documents. Further, Mrs. McKennon disputes that her copying and removal of the documents constituted such misconduct that would justify the application of the after-

acquired evidence defense. She argues that her actions were justified for her own protection. She argues that those issues should be left to the jury.

None of these disputes are material to the resolution of this case. The Court finds that what is material in this case is that Mrs. McKennon's copying and removal of the confidential documents constituted misconduct, which was in violation of her obligations as a confidential secretary. The dates on which she took the documents are irrelevant as long as she took them prior to her termination. Therefore the Court holds that there are no genuine issues as to material facts.

B.

The After-Acquired Evidence Doctrine

The Banner argues that it is entitled to summary judgment on the basis of the after-acquired evidence doctrine. This doctrine was stated clearly by the Tenth Circuit in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). It was adopted by the Sixth Circuit in *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992).

The Banner argues that under *Summers* and *Honeywell*, Mrs. McKennon is precluded from recovery, even assuming that she had been subjected to age discrimination, since Mrs. McKennon's unauthorized copying and removal of confidential materials, if known to it at the time, would have resulted in her immediate termination. Defendant's supplemental authority in support of summary judgment at 3 (filed March 3, 1992; Docket Entry No. 17).

In *Summers*, the plaintiff alleged he was wrongfully discharged from his position as a field claims representative due to his age and religious beliefs. In preparing for trial, the defendant employer examined the plaintiff's records and discovered that he had falsified over 150 records. The Tenth

Circuit agreed with the defendant's argument, that although this after-acquired evidence might not be relevant to show why the plaintiff was discharged, it was relevant in deciding what relief, if any, was available to the plaintiff. *Summers*, 864 F.2d at 704, 708.

In *Honeywell*, the plaintiff made false statements as to her college degree, other college courses taken and her job experience when she applied for the job. The job advertisement stated that Honeywell required a college degree in order for a candidate to be eligible. *Honeywell*, 955 F.2d at 411-12. The Sixth Circuit held that "under Michigan law, an employer may rely upon an employee's false representations made at the time of employment, of which the employer was unaware, and which were not the grounds for the employee's wrongful discharge, as a just cause defense to the employee's wrongful discharge and state civil rights claims." *Id.* at 410-11. The Sixth Circuit in *Honeywell* adopted the reasoning of *Summers*

while evidence acquired by an employer during discovery regarding plaintiff's 150 falsified claims during his employment as a field claims representative could not be said to constitute the actual "cause" for plaintiff's discharge, it was relevant to his claim of "injury" and precluded the grant of any relief or remedy under the federal civil rights law.

Honeywell, 955 F.2d at 415 (citing *Summers*, 864 F.2d at 708). "To argue ... that this after-acquired evidence should be ignored is utterly unrealistic." *Honeywell*, 955 F.2d at 415 (quoting *Summers*, 864 F.2d at 708).

The Banner also has brought to the Court's attention a very recent case: *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F.Supp. 1466 (D. Ariz. 1992), which relied on *Summers* in applying the after-acquired evidence defense. *O'Day* is factually similar to the case presently before this Court. In *O'Day*, the plaintiff, approximately six weeks

before he was selected for a company-wide lay off, surreptitiously entered his supervisor's office, removed his confidential personnel file from the desk, photocopied portions of the file, removed the copied documents from the premises, and showed the documents to another individual. A week later, without any authorization, Mr. O'Day returned to his supervisor's office after his shift, copied his entire personnel file, and removed the copied documents from the premises. Mr. O'Day claimed his purpose was to gather information to prepare his charge with the EEOC. *O'Day*, 784 F.Supp. at 1467. The employer discovered Mr. O'Day's wrongdoing only when counsel deposed him in defending the age discrimination lawsuit. *Id.* at 1468. The court in *O'Day* applied the after-acquired evidence doctrine. Finding that there was "no question as to the outcome of Mr. O'Day's employment status" had his employer known of his misconduct, the court granted summary judgment to the defendant. *Id.* at 1469.

Mrs. McKennon disputes the applicability of the after-acquired evidence doctrine. In addition, she claims that her conduct was justified for her own protection. She argues that the instant case differs from *Summers* and *Honeywell*¹ in that, in those cases, the alleged misconduct concerned material misrepresentations as to the plaintiffs' qualifications whereas it is not so here.² The Court agrees that Mrs. McKennon's misconduct was not identical to the misconduct in those cases. However, what matters is not whether the alleged misconduct is of exactly the same pattern. The central issue is the nature and materiality of

¹ Mrs. McKennon has not filed a response to the defendant's second supplemental authority (*i.e.*, the *O'Day* case).

² The court in *Summers* found "no meaningful distinction between a case involving the rejection of an application and a case involving the discharge of an employee." *Summers*, 864 F.2d at 707 n.3.

the alleged misconduct. Cf. *Honeywell*, 955 F.2d at 413. Mrs. McKennon admits that, as a confidential secretary to the managing staff of the Banner, she was obligated to not violate her duty of confidentiality. Affidavit of Imogene L. Stoneking at 1-2 (filed March 10, 1992; Docket Entry No. 24); McKennon deposition at 136, 137, 158. By copying and removing confidential materials without any authorization, she violated this duty of confidentiality.

In order to rely on the after-acquired evidence doctrine, the Banner must prove that, had it known of Mrs. McKennon's misconduct, it would have terminated her employment. *O'Day*, 784 F.Supp. at 1468.

[T]he after-acquired evidence must establish valid and legitimate reasons for the termination of employment.... These requirements are necessary to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge.

Honeywell, 955 F.2d at 414.

In this case, the Banner has established just cause for firing Mrs. McKennon by producing undisputed evidence establishing the nature and materiality of Mrs. McKennon's misconduct: Mr. Irby C. Simpkins, Jr., President of the Banner, stated that he would have terminated her immediately had he learned of her misconduct at any time prior to her discharge from the Banner on October 31, 1990. Affidavit of Irby C. Simpkins, Jr. at para. 5, appendix I to memorandum in support of defendant's motion for summary judgment.

The Court does not hold that any or all misconduct during employment constitutes just cause for dismissal or serves as a complete defense to a wrongful discharge action. The Court concludes, however, that Mrs. McKennon's

misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge. Mrs. McKennon has brought forth no evidence tending to prove that the Banner would have continued her employment had it learned of her misconduct prior to her termination.

Mrs. McKennon next argues that this case is different from *Honeywell*, in that she established a *prima facie* case of age discrimination and that a nexus exists between her misconduct and her discrimination claim. Plaintiff's response to defendant's motion for summary judgment (filed March 16, 1992; Docket Entry No. 25). The court in *Summers*, which was adopted by the Sixth Circuit in *Honeywell*, assumed age discrimination and still found that the after-acquired evidence doctrine prohibited recovery. *Summers*, 864 F.2d at 708. The nexus argument is irrelevant for the resolution of this case. If a plaintiff has engaged in misconduct severe enough to warrant termination upon discovery by the employer, then that plaintiff has no grounds that justify recovery for her termination. Whether the misconduct is related to the plaintiff's claim is irrelevant. Cf. *Honeywell*, 955 F.2d at 414; *Summers*, 864 F.2d at 704-07.

Mrs. McKennon's argument that she copied and removed the confidential materials for her own protection must also fail. It is recognized under the ADEA that an employee may not be discharged on the basis of the "opposition clause."³ Mrs. McKennon has not made such a

³ 29 U.S.C. § 623(d), provides:

Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against
(continued...)

claim and her conduct does not fall into that category.

III.

CONCLUSION

For the reasons stated above, the Banner's motion for summary judgment is granted.

³(...continued)

any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

MAY 5 1994

In The

Supreme Court of the United States

October Term, 1993

CHRISTINE McKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts properly denied Petitioner any remedy based on her admittedly serious misconduct, her concession that the doctrine of after-acquired evidence of wrongdoing applies to the facts of her case, and her inability to show any pretext.

TABLE OF CONTENTS

	<i>Page</i>
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. The Proceedings Below	1
B. Counter Statement of the Facts	3
Summary of Argument	7
Reasons for Denying the Writ	8
I. RELIEF WAS PROPERLY DENIED TO PETITIONER BECAUSE PETITIONER ADMITS BOTH SERIOUS WRONGDOING AND THE APPLICABILITY OF THE DOCTRINE.	8
A. All Circuits That Have Considered The Doctrine Have Adopted It.	9
B. The Doctrine Fully Applies To The Undisputed Facts Of This Case.	11
C. The Facts Of This Case Would Entitle Petitioner To No Relief.	13

Contents

	<i>Page</i>
II. SUMMARY JUDGMENT WAS PROPER BECAUSE PETITIONER SHOWED NO PRETEXT.	18
III. PETITIONER RELIES ON INAPPLICABLE LAW AND POLICY.	21
Conclusion	22

TABLE OF CITATIONS

Cases Cited:

<i>ABF Freight System, Inc. v. NLRB</i> , 114 S. Ct. 835 (1994)	15, 16, 17
<i>Agbor v. Mountain Fuel Supply Co.</i> , 810 F. Supp. 1247 (D. Utah 1993)	10
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	19, 20
<i>Benson v. Quanex Corp.</i> , 58 Fair Empl. Prac. Cases (BNA) 743 (E.D. Mich. 1992)	10
<i>Bonger v. American Water Works</i> , 789 F. Supp. 1102 (D. Colo. 1992)	10
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	19
<i>Churchman v. Pinkerton's, Inc.</i> , 756 F. Supp. 515 (D. Kan. 1991)	10

Contents

	Page
<i>DeVoe v. Medi-dyn, Inc.</i> , 782 F. Supp. 546 (D. Kan. 1992)	10
<i>Dotson v. United States Postal Service</i> , 977 F.2d 976 (6th Cir. 1992), <i>cert. denied</i> , 113 S. Ct. 263 (1992)	9
<i>Faulkner v. Super Valu Stores, Inc.</i> , 3 F.3d 1419 (10th Cir. 1993)	9
<i>George v. Meyers</i> , No. 91-2308-0, 1992 U.S. Dist. LEXIS 6419 (D. Kan. April 24, 1992)	10
<i>Johnson v. Honeywell Info. Sys., Inc.</i> , 955 F.2d 409 (6th Cir. 1992)	3, 9, 10
<i>Kristufek v. Hussmann Food Service Co.</i> , 985 F.2d 364 (7th Cir. 1993)	9, 11, 13, 14
<i>Landgraf v. USI Film Prods.</i> , 1994 U.S. LEXIS 3292 (April 26, 1994)	21
<i>Malone v. Signalj Processing Technologies, Inc.</i> , 826 F. Supp. 370 (D. Colo. 1993)	10
<i>Massey v. Trump's Castle Hotel & Casino</i> , 828 F. Supp. 314 (D. N.J. 1993)	10
<i>Mathis v. Boeing Military Airplane Co.</i> , 719 F. Supp. 991 (D. Kan. 1989)	10
<i>Mitushita Electrical Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	18, 19, 20

Contents

	Page
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 975 F.2d 302 (6th Cir. 1992), <i>cert. granted</i> , 113 S. Ct. 2991, <i>cert. dismissed</i> , 114 S. Ct. 22 (1993)	3, 9, 17, 18, 21
<i>Moodie v. Federal Reserve Bank</i> , 831 F. Supp. 333 (S.D. N.Y. 1993)	10
<i>O'Day v. McDonnell Douglas Helicopter Co.</i> , 784 F. Supp. 1466 (D. Ariz. 1992), <i>appeal docketed</i> , No. 92-15625 (9th Cir. 1992)	10
<i>O'Driscoll v. Hercules, Inc.</i> , 12 F.3d 176 (10th Cir. 1994)	9
<i>Paglio v. Chagrin Valley Hunt Club Corp.</i> , 1992 U.S. App. Lexis 15, 399 (6th Cir. June 25, 1992)	9
<i>Punahale v. United Air Lines, Inc.</i> , 756 F. Supp. 487 (D. Colo. 1991)	10
<i>Redd v. Fisher Controls</i> , 814 F. Supp. 547 (W.D. Tex. 1992)	10
<i>Reed v. AMAX Coal Co.</i> , 971 F.2d 1295 (7th Cir. 1992)	9, 14, 15
<i>Rich v. Westland Printers</i> , 62 Fair Empl. Prac. Cases (BNA) 379 (D. Md. 1993)	10
<i>Russell v. Microdyne Corp.</i> , 830 F. Supp. 305 (E.D. Va. 1993)	10

Contents

	<i>Page</i>
<i>Smith v. General Scanning, Inc.</i> , 876 F.2d 1315 (7th Cir. 1989)	9
<i>St. Mary's Honor Ctr. v. Hicks</i> , 113 S. Ct. 2742 (1993) ..	18, 19, 20
<i>Summers v. State Farm Mut. Auto. Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	3, 9, 13, 14, 21, 22
<i>Sweeney v. U-Haul Co. of Chicago</i> , 55 Fair Empl. Prac. Cases (BNA) 1257 (N.D. Ill. 1991)	10
<i>Trentham v. K-Mart Corp.</i> , 806 F. Supp. 692 (E.D. Tenn. 1991)	2
<i>Wallace v. Dunn Constr. Co., Inc.</i> , 968 F.2d 1174 (11th Cir. 1992)	9, 11, 14, 15, 21
<i>Washington v. Lake County, Ill.</i> , 969 F.2d 250 (7th Cir. 1992)	9, 10, 11, 14
 Statutes Cited:	
29 U.S.C. § 621	2
Tenn. Code Ann. § 4-21-101	2
Section 107 of the Civil Rights Act of 1991	21, 22

Contents

Other Authority Cited:

	<i>Page</i>
<i>Policy Guidance on Recent Developments in Disparate Treatment Theory</i> , N-915.063, EEOC Compl. Man. (BNA) N:2119	22

No. 93-1543

In The

Supreme Court of the United States

October Term, 1993

CHRISTINE McKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Proceedings Below

On May 6, 1991, Petitioner filed this lawsuit in the United States District Court for the Middle District of Tennessee alleging that her discharge from employment with Respondent the

Nashville Banner Publishing Co. ("the Banner")¹ violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101.² (R. 1). After Petitioner's responses to the Banner's requests for documents and Petitioner's deposition revealed that she had stolen proprietary and confidential documents from the Banner during her employment as a confidential secretary for the Banner's Comptroller, the Banner moved for summary judgment. (R. 7-9). The grounds for the motion for summary judgment ("Motion") were that Petitioner's admission of theft left no genuine disputes of material fact. Specifically, the Motion posited that Petitioner's admission that had the Banner known of the theft she could and would have been discharged and the undisputed testimony of four of the Banner's principals precluded Petitioner from any relief under the doctrine of after-acquired evidence of wrongdoing ("the doctrine"). (R. 21-24).

Petitioner sought and was granted an extension of time to respond to the Banner's Motion. (R. 10 & 12). Both before and during that time, Petitioner conducted discovery, taking the depositions of four of the Banner's principals.³

1. The Banner is a closely held private corporation, with no parent or subsidiary company, in the business of publishing a daily newspaper known as the *Nashville Banner*.

2. Analysis of Plaintiff's age discrimination claim under Tenn. Code Ann. § 4-21-101 is the same as under the ADEA. *Trentham v. K-Mart Corp.*, 806 F. Supp. 692 (E.D. Tenn. 1991).

3. Specifically, Petitioner deposed Irby C. Simpkins, Jr., President of the Banner and Publisher of the *Nashville Banner*; Edward F. Jones, Editor of the *Nashville Banner*; Imogene Stoneking, Comptroller of the Banner and Petitioner's supervisor; and Elise D. McMillan, General Counsel and Executive Vice President of the Banner.

After these depositions, Petitioner opposed the Banner's Motion by arguing that summary judgment should be denied because her wrongdoing was not serious enough to warrant termination. (R. 25). The district court granted the Banner's Motion, finding that the undisputed facts revealed that the nature and materiality of Petitioner's misconduct provided "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge." App. 17a.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that, based on the facts of this case, the district court properly granted summary judgment. App. 2a. Specifically, the Sixth Circuit relied on *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and two prior Sixth Circuit cases⁴ to hold that the doctrine applied to Petitioner's misconduct during her employment. App. 4-8a. In addition, the Sixth Circuit rejected Petitioner's argument that she was justified in having a "lever with which to resist" a possible discharge, App. 8a, noting that adoption of this theory would justify an employee's taking money from her employer to support herself in anticipation of unlawful discharge. App. 9a.

In her Petition for a Writ of Certiorari, Petitioner concedes the applicability of the doctrine but asks this Court to select the Eleventh Circuit's approach to the remedies available under the doctrine rather than that taken by the Sixth Circuit. Petition at 11.

B. Counter Statement of the Facts

In reviewing the Motion, the district court viewed the facts in the light most favorable to Petitioner. However, the statement of

4. *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409 (6th Cir. 1992); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993).

the facts in the Petition is so misleading that Petitioner has in effect attempted to recast the facts as developed by the record. Petitioner has omitted many material facts developed in the proceedings below and misstated other facts that are relevant to the disposition of the Petition. Accordingly, the Banner presents the facts as they appear in the record.⁵

Petitioner was an at-will employee who was one of nine employees laid off October 31, 1990, as part of a reduction in force the Banner instituted to address financial concerns.⁶ (R. 2). From March, 1989, through October 31, 1990, Petitioner held the position of secretary to Imogene Stoneking, the Banner's Comptroller.⁷ (R. 1). Petitioner's duties in this position included maintaining personnel files, assisting in the preparation of the Banner's annual budget, processing time sheets, and doing various other tasks assigned to her by Ms. Stoneking. (R. 1).

As secretary to the Comptroller, Petitioner had access to confidential documents and information, including payroll data, financial information, personnel files, and other confidential records. (R. 8). In her deposition, Petitioner admitted that she

5. It should be noted that Petitioner fails to cite to any record other than the district and appellate courts' decisions.

6. In her statement of the facts, Petitioner concedes that she was aware of the Banner's financial concerns, but she adds an incorrect gloss to her factual statement when she states that the Comptroller "began to suggest retirement," implying that the question of Petitioner's retirement came up more than once. In her deposition, Petitioner admitted that the Comptroller asked Petitioner about her retirement plans once, and only once. (R. 39).

7. Contrary to her statement in her Petition, Petitioner was not employed by the Nashville Banner Publishing Co. since May, 1951. Petitioner was employed by the corporate defendant in this case only since 1971. (See generally, R. 39).

understood that all of this information was confidential and proprietary business information. (R. 39). Petitioner also admitted that she understood that the Banner was relying upon her to safeguard the confidentiality of the business and proprietary information to which she had access as the Comptroller's secretary. (R. 39). She further admitted knowing that she was to keep this information strictly confidential and that the failure to do so could and would result in termination. (R. 39).

Thus, despite holding a position of trust with the Banner and despite being fully aware of her obligation to maintain the confidentiality of the information to which she was privy, Petitioner admitted during her deposition that she surreptitiously photocopied and removed from the Banner's premises several sensitive financial documents and personnel records.

Contrary to Petitioner's implication in her Petition that the documents she copied and took home were nothing more than published "newspaper financial information," Petition at 5 n. 2, the stolen documents contained financial data of the Banner, its officers, and others. Specifically, the Banner discovered during Petitioner's deposition that, before she was terminated, Petitioner had copied the Nashville Banner Fiscal Period Payroll Ledger that set forth salaries and related information pertaining to the Banner's owners, several management personnel, and certain administrative staff. (R. 39). She also copied the Nashville Banner Publishing Co.'s 1989 Profit and Loss Statement. (R. 39).

Petitioner admitted that in copying these documents she intentionally disobeyed the Comptroller's specific instructions to shred them. (R. 39). Instead, she photocopied the documents and used them for her own purposes. (R. 39). Knowing full well the highly confidential nature of these documents and her duty to maintain their confidentiality, Petitioner removed them from the

Banner's premises and shared the information with her husband.⁸ (R. 39). Because Petitioner knew that she was not authorized to take and use these documents for her own purposes, she copied and removed them secretly, not telling the Comptroller or anyone else at the Banner that she had copied these documents or that she was removing them from the premises. (R. 39).

In addition to the documents she had been instructed to shred, Petitioner secretly copied and removed from the Banner's premises several documents contained in the personnel file of a Banner manager. (R. 39). Among these documents was a confidential agreement entered into between the Banner and the manager and a series of documents relating to that agreement. (R. 39). Petitioner admitted that she understood she was not authorized to copy any of these documents, much less remove them from the Banner's premises and share the contents with anyone. (R. 39).

The first time the Banner became aware that Petitioner had secretly copied and removed confidential financial and personnel documents was during her deposition on December 18, 1991.⁹ (R.

8. Petitioner divulged to her husband confidential and proprietary salary information concerning the following individuals: Irby Simpkins, President of the Banner and Publisher of the *Nashville Banner*; Brownlee Currey, Chairman of the Board of the Banner; Elise McMillan, the Banner's General Counsel and Executive Vice-President for Administration; Imogene Stoneking, Comptroller; Edward F. Jones, Editor of the *Nashville Banner*; Jack Gunter, Director of Special Projects; and various secretaries. (R. 39).

Although Petitioner tries to understate the severity of her misconduct, the Banner was forced to obtain a protective order in the district court in order to protect the proprietary and confidential information that Petitioner had put at the unfettered disposal of herself and her husband. (R. 6).

9. During discovery, Petitioner produced confidential and proprietary documents belonging to the Banner. However, the Banner did not know when or how Petitioner obtained these documents until her deposition.

8). Petitioner testified that she took these documents without authorization from and without asking anyone at the Banner, that she had been instructed to shred two of the documents she copied, and that she understood that these actions could and would subject her to termination. (R. 39). In her deposition, she testified that the reason she copied and removed the documents was for her "insurance" and "protection." App. 12a.¹⁰

As a result of the discovery of Petitioner's misconduct, the Banner informed her by letter that her actions constituted deliberate misconduct involving breach of trust and confidentiality obligations essential to her position as a confidential secretary. (R. 8). In this letter, in his Affidavit, and in his deposition, the Banner's President stated that had the Banner been aware of Petitioner's breach of trust and misconduct at the time that it occurred or at any time thereafter the Banner would have terminated her immediately. (R. 8; R. 29). Similarly, in affidavits and again in deposition testimony, every other member of the Banner's management involved in Petitioner's employment stated unequivocally under oath that they would have terminated or recommended termination of Petitioner. (R. 8). Even though Petitioner's counsel deposed each of these managers, she is able to offer nothing to rebut their testimony. App. 17a.

SUMMARY OF ARGUMENT

This Court should not grant *certiorari* because the facts of this case would entitle Petitioner to no relief in any of the circuits that have applied the doctrine. Therefore, summary judgment was properly granted against Petitioner.

10. It was only in an affidavit filed three months after her deposition to resist the Banner's Motion that Petitioner decided that her intent in taking the documents was to learn information about her job security concerns. (R. 28). The Banner's objection to Petitioner's effort to recast the facts by way of a sham affidavit was mooted by the district court's grant of the Motion.

All of the circuits that have considered the doctrine have applied it, and Petitioner concedes the applicability of the doctrine. Further, all of the circuits have recognized that the doctrine is to be applied on a case-by-case basis and that there is no absolute rule regarding the doctrine. Based on the facts of each case and on the employer's proof, the circuits have applied the doctrine either to preclude all relief or to allow only limited relief. Therefore, contrary to Petitioner's contention, the circuits are not "irreconcilably in conflict." Close inspection of the cases reveals that the differences between the circuits result not in the application of the doctrine but from each set of facts presented.

In the present case, Petitioner disputes only the denial of back pay by the Sixth Circuit. However, based on a case-by-case review, the unique facts of this case would bar Petitioner from any relief, including back pay, because the undisputed facts established that she engaged in serious on-the-job misconduct and that this misconduct would have led to her termination if her employer had known about it while she was employed. Thus, based on the undisputed material facts of this case, Petitioner would have been denied relief under the approaches taken by all of the circuits that have addressed the doctrine.

Therefore, this case is not a proper vehicle for the Court to review the availability of back pay under the doctrine.

REASONS FOR DENYING THE WRIT

I.

RELIEF WAS PROPERLY DENIED TO PETITIONER BECAUSE PETITIONER ADMITS BOTH SERIOUS WRONGDOING AND THE APPLICABILITY OF THE DOCTRINE.

Petitioner misleads the Court when she inaccurately states

that this case presents the same issue as *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), and that the circuits are in irreconcilable conflict over the issue. All that Petitioner has done is to restate the question presented from *Milligan-Jensen*, ignoring the obvious differences that the two cases present. Based on the unique facts of the present case, any conflicts between the circuits dissolve, making Petitioner's statement misleading and inaccurate.

A. All Circuits That Have Considered The Doctrine Have Adopted It.

Specific articulation of the doctrine arose in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). The Tenth Circuit in *Summers* reasoned that, even though the employee's on-the-job misconduct was not the actual cause for the discharge, summary judgment for the employer was proper because the employee's misconduct precluded any relief. *Id.* at 708. Since the *Summers* decision¹¹, the Sixth¹², Seventh¹³, and Eleventh Circuits¹⁴

11. In addition to the *Summers* case, the Tenth Circuit has applied the doctrine in two other cases: *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (10th Cir. 1994) and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993).

12. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993); *Paglio v. Chagrin Valley Hunt Club Corp.*, 1992 U.S. App. Lexis 15,399 (6th Cir. June 25, 1992); *Dotson v. United States Postal Service*, 977 F.2d 976 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992).

13. *Kristufek v. Hussmann Food Service Co.*, 985 F.2d 364 (7th Cir. 1993); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989).

14. *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992).

have recognized the applicability of the doctrine under certain circumstances. In addition, district courts in many circuits¹⁵ have applied the doctrine. Therefore, the circuits are not in irreconcilable conflict over the doctrine.

Further, all of the circuits have applied the doctrine with care to avoid having employers rummage through a discharged employee's file and ferret out minor infractions to justify after-the-fact an otherwise discriminatory discharge. See, e.g., *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409, 414 (6th Cir. 1992); *Washington v. Lake County, Ill.*, 969 F.2d 250, 255-56 (7th Cir. 1992). The standard for the doctrine is high to avoid just such abuse. Thus, where — and only where — the employee's wrongdoing is of the magnitude that there would be just and proper cause for termination and the evidence is undisputed that the employer would in fact have discharged the employee does the doctrine come into play.

15. The following is a representative, not exhaustive, list: *Moodie v. Federal Reserve Bank*, 831 F. Supp. 333 (S.D. N.Y. 1993); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993); *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cases (BNA) 379 (D.Md. 1993); *Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D. Va. 1993); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247 (D. Utah 1993); *Malone v. Signalj Processing Technologies, Inc.*, 826 F. Supp. 370 (D. Colo. 1993); *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal docketed, No. 92-15625 (9th Cir. 1992); *Benson v. Quanex Corp.*, 58 Fair Empl. Prac. Cases (BNA) 743 (E.D. Mich. 1992); *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992); *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992); *DeVoe v. Medi-dyn, Inc.*, 782 F. Supp. 546 (D. Kan. 1992); *George v. Meyers*, No. 91-2308-0, 1992 U.S. Dist. LEXIS 6419 (D. Kan. April 24, 1992); *Sweeney v. U-Haul Co. of Chicago*, 55 Fair Empl. Prac. Cases (BNA) 1257 (N.D. Ill. 1991); *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515 (D. Kan. 1991); *Punahale v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991 (D. Kan. 1989).

Those circuits that have adopted the doctrine have taken slightly different approaches to how an employee's serious and material misconduct should affect his or her remedy. The Tenth and Sixth Circuits and the Seventh Circuit in *Washington* have agreed that serious misconduct should bar any remedy. The Eleventh Circuit and the Seventh Circuit in *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993), have declined to cut off all prospect of back pay under the specific facts that those cases presented. Indeed, the Eleventh Circuit has stated unequivocally that the scope of the remedy is best determined on a case-by-case basis. *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1181 (11th Cir. 1992).

B. The Doctrine Fully Applies To The Undisputed Facts Of This Case.

All of the facts necessary to apply the doctrine are undisputed in the present case. Petitioner admitted that she secretly copied confidential and proprietary business information from the Banner while she was employed there. Petitioner then removed the documents from the Banner's premises and shared the contents with her husband and attorney.

Petitioner admitted knowing that this information was to be kept strictly confidential and that the failure to do so could and would result in termination. She also admitted that she intentionally disobeyed specific instructions by her superior to shred some of the documents. Petitioner also testified under oath that she took confidential documents from a manager's personnel files, including information about the manager's salary and related matters, to use for her own benefit. Petitioner did not have permission to take any of these documents.

The district court found Petitioner's actions to be both undisputed and the type of misconduct contemplated by the doctrine.

The Court does not hold that any or all misconduct during employment constitutes just cause for dismissal or serves as a complete defense to a wrongful discharge action. The Court concludes, however, that Mrs. McKennon's misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge.

App. 16a-17a.

In addition, the district court found that the undisputed evidence showed that the Banner fully met its burden of proving that Petitioner would have been terminated for her misconduct had the Banner known about it while she was still employed there. Under oath, the President and three top-level Banner managers all testified unequivocally that had the Banner been aware of Petitioner's breach of confidentiality and misconduct at the time that it occurred, or at any time thereafter, the Banner would have terminated her immediately.¹⁶ The district court also found that Petitioner was unable to offer any evidence even tending to show that the Banner would have continued her employment had the Banner known of her misconduct before her termination. App. 17a. Indeed, Petitioner admitted that she knew she could and would have been discharged had she breached her duty of confidentiality. (R. 39).

16. Contrary to the misleading impression in the Petition, the Banner's proof that it would have fired Petitioner was not based "solely" on affidavits from the Banner's principals. Petitioner's counsel also took depositions of these principals.

The district court properly applied the summary judgment standard to the facts of this case and found that because there were no genuine issues of material fact the Banner was entitled to summary judgment as a matter of law.

C. The Facts Of This Case Would Entitle Petitioner To No Relief.

The facts of this case differ from those in the cases Petitioner cites.

Applying the facts of the instant case to the position taken by the Seventh Circuit in *Kristufek* would not change the result reached by the Sixth Circuit. The Seventh Circuit in *Kristufek* stated that an employee can recover back pay only where the after-acquired evidence involved a non-critical, non-fundamental job requirement and the employer did not adequately show that the employee *would* have been fired, not just that the employee *might* have been fired, for the misconduct in question.¹⁷ *Kristufek*, 985 F.2d at 369.

In the present case, Petitioner admitted stealing confidential and proprietary documents from the Banner. The after-acquired evidence of theft clearly involved a critical and fundamental job requirement. In keeping with the standards of the doctrine, the district court found that Petitioner's misconduct rose to the level of being serious and material. Also, the district court found that the Banner *would* have fired Petitioner for theft of the confidential and proprietary documents. Therefore, even under the Seventh

17. The court in *Kristufek* distinguished *Summers* based on significant factual and proof differences between the cases. In *Kristufek*, the employer did not prove that it *would have fired* the employee for his misconduct, whereas in *Summers* the employer met this burden. As in *Summers*, the Banner proved unequivocally that it *would have fired* Petitioner.

the Seventh Circuit's approach in *Kristufek*, Petitioner would not be entitled to any relief.¹⁸

Only seven months before the *Kristufek* decision, the Seventh Circuit relied on *Summers* in deciding *Washington*. Applying the *Summers* rule, the Seventh Circuit panel affirmed summary judgment in favor of the employer and concluded that the employee was not entitled to relief because he would have been fired for the later-discovered serious misconduct.¹⁹ *Washington*, 969 F.2d at 256-57. Curiously, the Seventh Circuit in *Kristufek* did not mention its prior decisions in *Washington* or *Reed*. However, from the different outcomes in *Kristufek* and *Washington*, it is clear that the Seventh Circuit, like the Eleventh Circuit, has not adopted a stringent rule regarding the doctrine but will decide each case on its facts. This is contrary to Petitioner's assertion that the Seventh Circuit has taken an "intermediate position on this issue." Petition at 9.

Like the other circuits that have addressed this issue, the Eleventh Circuit in *Wallace*, declined to adopt a rigid rule and specifically stated that it will review the issue of after-acquired

18. Significantly, the court in *Kristufek* addressed the issue of damages only after upholding the jury's finding of discrimination. The court in *Kristufek* held that sufficient evidence of discrimination was presented for the jury to find pretext. Petitioner has presented no evidence of discriminatory pretext in this case. See Section II, *infra*. Most of the cases allowing limited relief under the doctrine have involved evidence of discrimination.

19. Between the time of the decisions of *Washington* and *Kristufek*, the Seventh Circuit decided *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992). In *Reed*, the court, upholding summary judgment for the employer on other grounds, stated that under *Summers* the employer would have been entitled to summary judgment had it proved that it would have fired the employee for the misconduct at issue. *Id.* at 1298. If the employer had met its burden of proof, then the employee would have been denied any relief. *Id.*

evidence on a case-by-case basis. 968 F.2d at 1178. Thus, in the absence of a hard and fast rule, the Eleventh Circuit has implicitly condoned denial of back pay in an appropriate situation, which the present case presents. Therefore, the Eleventh Circuit's decision in *Wallace* is not "irreconcilably in conflict" with other circuits as Petitioner asserts.

Petitioner concedes that the Eleventh Circuit in *Wallace* recognized that wrongdoing can limit the relief available. Notwithstanding its acceptance of the doctrine, the Eleventh Circuit in *Wallace* hypothesized some extreme possibilities of employer abuse. See 968 F.2d at 1180-81. The present case defies the "parade of horrors" listed in *Wallace*, which do not occur in the after-acquired evidence situation if the standards of the doctrine are properly applied. The requirements that misconduct be material and job related and that the employer carry its burden of proving that it would have fired the employee had it known the truth fully protect against any employer abuse. Actually, this case presents the perfect scenario for the application of the doctrine: Petitioner voluntarily divulged to the Banner and later admitted to her serious misconduct. There is no evidence of employer abuse in the present case.

Petitioner cites to this Court's recent decision in *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835 (1994), stating that it deals with a related issue. However, *ABF* is significantly distinguishable from the present case and, therefore, is not applicable here.

First, *ABF* is not an after-acquired evidence case.²⁰ The employer in *ABF* knew prior to making the termination decision that the employee had lied about why he was late to work. After the employee was terminated, he again lied, this time under oath to an

20. The *ABF* decision does not mention or refer to the after-acquired evidence doctrine and does not cite any after-acquired evidence cases.

NLRB Administrative Law Judge. Second, this Court in *ABF* did not judge the merits of whether the employee should have been reinstated with back pay, even though he committed perjury. Rather, the only question was whether the agency had the discretion to fashion the remedy it did in the case.²¹

However, this Court did not completely ignore the merits of the agency's decision. This Court agreed with the employer that, consistent with its appraisal of the employee's false testimony, reinstatement and back pay should have been precluded. *Id.* at 839. Justices Scalia and O'Connor in their concurring opinion invoked the "unclean hands" doctrine and stated, "[t]he principle that a perjurer should not be rewarded with a judgment — even a judgment otherwise deserved — where there is discretion to deny it, has a long and sensible tradition in the common law." *Id.* at 842. This statement applies with equal merit to the misconduct of theft and deceit in the present case.

Third, because of the facts presented by *ABF* and the narrow issue before it, this Court did not have to determine whether the employer could prove that it would have fired the employee for the misconduct as is required in after-acquired evidence cases. Again, however, this Court did not completely ignore this issue. This Court noted that "[t]he Board found that the record in this case unequivocally established that *ABF* did not treat Manso's dishonesty 'in and of itself as an independent basis for discharge or any other disciplinary action.'" *Id.* at 838 n. 5 (citing 304 N.L.R.B. 585, 590 (1991)).

Fourth, as in after-acquired evidence cases that have allowed a plaintiff limited relief in the form of back pay, there was direct

21. This Court's decision to uphold the NLRB's ruling was based on mandatory deference to the agency in the absence of evidence that the agency's decision was arbitrary, capricious, or manifestly contrary to law. *AFB*, 114 S. Ct. at 839.

evidence of unlawful conduct by the employer in support of the employee's contention that the termination decision was pretextual. There is no evidence of pretext in the present case. See Section II, *infra*. Therefore, this Court's decision in *ABF* does not restrict the application of the after-acquired evidence doctrine to preclude relief in cases where the employer can prove that it would have terminated an employee for serious on-the-job misconduct discovered after the employee's termination.

Contrary to Petitioner's unfounded assertion, the facts presented in the present case are more obviously compelling than those in *Milligan-Jensen*, providing even stronger support to apply the doctrine to preclude relief to Petitioner. Unlike the present case, in *Milligan-Jensen* there was direct evidence of sex discrimination by the employer.²² Petitioner's attempt to argue that *Milligan-Jensen* is somehow materially different from the present case because it involved application fraud is also misguided. The Sixth Circuit in both *Milligan-Jensen* and this case applied the same standard: whether the employee *would have been fired* if the employer had known of the serious misconduct. Once there is a finding of "would have been fired," whether the misconduct occurred prior to or during employment is irrelevant. *Milligan-Jensen*, 975 F.2d at 304-05 & n. 3.

Further, there is no proof that the Banner's actions in any way caused Petitioner to steal confidential and proprietary documents, as Petitioner asserts.²³ The district court found as a matter of law

22. Petitioner's statement that this case presents facts that are arguably more compelling than those in *Milligan-Jensen* has a paradoxically boomerang effect because in that case there was direct evidence of discrimination, whereas there is none in this case. See 975 F.2d at 303 ("You're the woman, aren't you? ... You've got the lady's job."). In this case, there is neither direct nor circumstantial evidence of discrimination.

23. It goes without saying that stealing personal and proprietary information has no connection to protection from any future alleged discrimination.

that Petitioner's motivation in stealing the documents was irrelevant to the application of the doctrine. Therefore, when compared to *Milligan-Jensen*,²⁴ the facts of the present case should compel this Court to deny certiorari because the Sixth Circuit clearly reached the proper result even in light of decisions from other circuits.

II.

SUMMARY JUDGMENT WAS PROPER BECAUSE PETITIONER SHOWED NO PRETEXT.

Petitioner offered no evidence to rebut the Banner's proof that she would have been terminated had it discovered her misconduct while she was employed. App. 17a. In the absence of any showing that the Banner's explanations were pretextual, summary judgment for the Banner was proper.

Just recently, this Court clarified the evidentiary formula for proving pretext: "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993) (emphasis in original). There are no facts in this case to support even an inference, much less proof, either that the Banner's evidence that Petitioner would have been discharged was false or that the Banner fabricated this reason to discriminate against Petitioner.

Even if Petitioner had not admitted the applicability of the doctrine to her case, summary judgment against Petitioner would have been properly granted because she is unable to meet this Court's standard to survive summary judgment under *Matsushita*

24. Significantly, the Sixth Circuit in *Milligan-Jensen* reversed the district court's denial of summary judgment and directed that judgment be entered in favor of the employer.

Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time to conduct full discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.²⁵

As the facts show, Petitioner had adequate time to conduct full discovery. After Petitioner served interrogatories and document requests and received timely responses, Petitioner sought and was granted leave to complete additional depositions to rebut the Banner's Motion. Both before and after the extension of time, Petitioner deposed four of the Banner's principals.

Notwithstanding ample time to discover any pretext on the part of the Banner, Petitioner found none. Petitioner made no showing that the Banner fabricated evidence against her or treated her differently from other employees. The record is clear that the Banner fully carried its burden of proof and that Petitioner made no showing that this proof was pretextual. See *St. Mary's Honor Ctr.*, 113 S. Ct. at 2748. Accordingly, under this Court's 1986 trilogy of cases, summary judgment was proper.

25. The ultimate burden is on the non-moving party to show the existence of a genuine issue of material fact: "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' Fed. Rule Civ. Proc. 56(e)." *Matsushita*, 475 U.S. at 586-87. (emphasis supplied). Finally, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment, . . . even where the evidence is likely to be within possession of the defendant, as long as the plaintiff had had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

Petitioner's hypothetical argument betrays a misunderstanding of this trilogy of cases and of her ultimate burden. Petitioner argues that if the Banner had known about and terminated her for stealing the documents she could simply have claimed that the reason for discharging her was pretextual and had a jury trial on the issue. Petition at 10. This argument is without merit.

Petitioner has the ultimate burden to come forward with more than "some metaphysical doubt as to the material facts" in order to present a jury question. *Matsushita*, 475 U.S. at 586-87. Petitioner could not merely have "alleged that the Banner's reason was a pretext for age discrimination, and had a jury trial on the issue." Petition at 10. Rather, in the face of a properly supported motion for summary judgment, Petitioner would be required to present affirmative evidence of pretext, *Anderson*, 477 U.S. at 257, tending to show that the Banner's reason for termination was false or that it would have continued her employment. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2751-54.

In the present case, Petitioner has come forward with not even a scintilla of either pretext or discrimination. If Petitioner had been able to show pretext, her hypothetical might have some credibility, but the undisputed facts of the present case would not entitle Petitioner to a jury trial on the issue of pretext. Thus, even if Petitioner had not conceded that her misconduct warranted application of the doctrine to her claim of discrimination, her case would remain subject to summary judgment, contrary to Petitioner's hypothetical.

III.

PETITIONER RELIES ON INAPPLICABLE LAW AND POLICY.

Petitioner's reliance on Section 107 of the Civil Rights Act of 1991 ("CRA 1991") both is misplaced and undermines her plea that what she characterizes as the remedy "rule"²⁶ by the Eleventh Circuit be adopted. First, CRA 1991 is inapplicable to the ADEA in regard to proof or remedy. Second, CRA 1991 does not apply to conduct that occurred before the effective date of this Act, November 21, 1991, and to a lawsuit filed before that date. *Landgraf v. USI Film Prods.*, 1994 U.S. LEXIS 3292 (April 26, 1994). Here, both the Banner's reduction in force and the lawsuit occurred well before November 21, 1991.²⁷

Petitioner points to the EEOC's position taken in its *amici curiae* brief in support of the grant of certiorari in *Milligan-Jensen*. Whatever position that the EEOC takes when it is litigating in its advocacy role is irrelevant here, but its policy guidance statements are relevant. Before CRA 1991, which is the applicable time for this case, the EEOC issued guidance directing its own staff to follow *Summers*:

[I]n these circumstances, as in cases where discrimination is proved through circumstantial evidence, the employer may be able to limit other relief available to the plaintiff by showing that after-the-fact lawful reasons would have justified the same action.

26. The Eleventh Circuit has not adopted an inflexible "rule." Rather, the *Wallace* decision adopted a case-by-case analysis.

27. Even if CRA 1991 were applicable, § 107(b) specifically disallows any back pay, which is what Petitioner seeks.

For example, if a charging party is terminated for discriminatory reasons, but the employer discovers afterwards that she stole from the company, and it has an absolute policy of firing anyone who commits theft, *then the employer would not be required to reinstate the charging party or to provide back pay. . . . See, e.g. Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700, 48 EPD ¶ 38,543 (10th Cir. 1988) (plaintiff entitled to no relief where evidence that he falsified numerous company records was discovered after termination). . . .

Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, EEOC Compl. Man. (BNA) N:2119 at 2132-33 and n.17 (emphasis added).²⁸ Under this guidance, then, the Commission would not have sought any individual relief on behalf of Petitioner where after-acquired evidence of misconduct showed that termination was inevitable.

CONCLUSION

The Petition before the Court should be denied because the Sixth Circuit's judgment was proper in this case. Even under other circuits' approaches to the application of the doctrine, the result in the present case would not be different. Petitioner concedes the applicability of the doctrine to her admitted theft of her employer's confidential and proprietary documents. Petitioner admits that had her employer known about the theft she could and would have been discharged. At the same time that she concedes the applicability of the doctrine to her admittedly serious wrongdoing, Petitioner is

28. After CRA 1991, the EEOC changed its view of *Summers*. However, it is the EEOC's view of *Summers* before CRA 1991 that is instructive here because, as previously stated, CRA 1991 does not apply to the present case.

asking this Court to reward her with money damages. This position is untenable, especially in view of Petitioner's failure to make any showing of pretext. Therefore, it would not be a judicious expenditure of the Court's resources to review the present case.

Accordingly, the Banner respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S RESPONSE TO BRIEF
IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. THERE IS A CLEAR CONFLICT BETWEEN THE CIRCUITS CONCERNING THE CONSEQUENCES OF AFTER-ACQUIRED EVIDENCE	1
II. THE POSITION OF THE UNITED STATES IN <i>MILLIGAN-JENSEN</i> IS RELEVANT TO WHETHER CERTIORARI SHOULD BE GRANTED IN THIS CASE.	3
CONCLUSION	5

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993)	2
Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), <i>cert. granted</i> , ___ U.S. ___, 125 L.Ed.2d 686, <i>cert. dismissed</i> , 125 L.Ed.2d 773 (1993)	2, 3
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) ..	3, 4
Summers v. State Farm Ins., 864 F.2d 700 (10th Cir. 1988)	2
Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992)	2
Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992)	2
Welch v. Liberty Machine Works, Inc., ___ F.3d ___ (8th Cir. No. 93-2670, May 6, 1994)	3
 <i>Statutes:</i>	 <i>Pages:</i>
Civil Rights Act of 1991	3

IN THE

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PETITIONER'S RESPONSE TO BRIEF IN
OPPOSITION

I.

THERE IS A CLEAR CONFLICT BETWEEN THE
CIRCUITS CONCERNING THE CONSEQUENCES OF
AFTER-ACQUIRED EVIDENCE

Respondent argues that there is no conflict between the circuits on the question of the after-acquired evidence doctrine because all of the circuits that have ruled have adopted the doctrine. Respondent misconstrues the different positions of the circuits and, therefore, does not properly analyze whether there is a conflict.

The conflict is not over whether after-acquired evidence that would support the challenged employment

decision if it had been known at the time should or should not be considered by a court deciding an employment discrimination claim. Rather, the dispute is over the effect of the after-acquired evidence on whether or not it bars any relief for a plaintiff who has suffered illegal discrimination. That conflict is real and consequential.

As respondent acknowledges, the Tenth and Sixth Circuits bar *any* remedy.¹ (Brief in Opposition, p. 11.) The Eleventh Circuit, on the other hand, has squarely rejected the Tenth Circuit rule and has held that the effect of after-acquired evidence is only to limit the remedy available, not to defeat liability.² (*Id.*) The Seventh Circuit has been equivocal, indicating that at least in some cases all relief will not be barred.³ (*Id.* at 10-11.)⁴

The conflict is not, as respondent would have it, over "slightly different approaches." (*Id.* at 11.) If the present case had arisen in the Eleventh Circuit, for example, the burden would have been on respondent to prove that it would have discovered petitioner's alleged misconduct even

¹*Summers v. State Farm Ins.*, 864 F.2d 700 (10th Cir. 1988); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993).

²*Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992).

³*Compare Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) with *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993).

⁴The Eighth Circuit has recently decided to follow *Summers* rather than *Wallace*. *Welch v. Liberty Machine Works, Inc.*, ___ F.3d ___ (8th Cir. No. 93-2670, May 6, 1994). However, the Eighth Circuit also imposed a heavy burden on the employer of establishing that the policy that allegedly would have justified the employee's termination pre-dated the challenged personnel action, and held that self-serving affidavits by company officials were not sufficient.

in the absence of the litigation (a highly dubious proposition) and when it would have made that discovery. Petitioner would have been entitled to back pay (and, under the Age Discrimination Act, perhaps liquidated damages) up to that point, as well as her attorneys' fees. Under the Sixth and Tenth Circuit rules she was entitled to nothing even though she was (as must be assumed in the posture of the case as it stands now) the victim of age discrimination and even though, in the absence of her justified fear of being illegally fired, she would not have committed the alleged misconduct.

In short, there is as much disarray between the circuits over whether another reason for a challenged employment decision bars a finding of liability or only limits relief as the disarray that led this Court to grant certiorari in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 n.2 (1989). The issue presented here is equally as important as in that case, the conflict is as great, and a grant of certiorari is as necessary and justified.

II.

THE POSITION OF THE UNITED STATES IN *MILLIGAN-JENSEN* IS RELEVANT TO WHETHER CERTIORARI SHOULD BE GRANTED IN THIS CASE.

In its brief, respondent seeks to discount the position taken by the United States in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993) by suggesting that that position depended on the Civil Rights Act of 1991 being applicable here. This is not the case, however. The government's argument was that the after-acquired doctrine of the Tenth and Sixth Circuits undermined enforcement of the anti-discrimination laws. In addition, its brief in support of a grant of certiorari in *Milligan-Jensen* pointed out that the

doctrine was inconsistent with this Court's decision in *Price Waterhouse v. Hopkins*, *supra*, which, of course, predated the 1991 Act. (Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p. 10.) Its reference to the 1991 Act acknowledged that it was not directly applicable, but noted that it was an expression by Congress that discrimination constitutes a violation of the law, and that the existence of an alternative reason for the challenged employment action should not defeat liability under the anti-discrimination statutes. (*Id.* at 12.)

Finally, the now-superseded EEOC Policy Guidance cited by respondent at pages 21-22 of its brief supports petitioner's argument that liability is not barred by after-acquired evidence. In the paragraph quoted by respondent, the EEOC states unequivocally that the plaintiff is entitled to some relief, although the employer may be able to limit that relief. Whether this states the proper rule, and the extent to which full relief should be limited, are precisely the issues presented by this case.⁵

⁵In addition to supporting the grant of certiorari in *Milligan-Jensen*, the EEOC filed an amicus brief and argued in support of petitioner when this case was before the Sixth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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No. 93-1543

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHRISTINE MCKENNON,
Petitioner,
v.

THE NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

**MOTION AND BRIEF *AMICI CURIAE* OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS,
WOMEN'S LEGAL DEFENSE FUND, OLDER
WOMEN'S LEAGUE, FEDERALLY EMPLOYED
WOMEN, NATIONAL TREASURY EMPLOYEES
UNION, AND THE NATIONAL EMPLOYMENT
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IN THE
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MOTION OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS,
WOMEN'S LEGAL DEFENSE FUND, OLDER
WOMEN'S LEAGUE, FEDERALLY EMPLOYED
WOMEN, NATIONAL TREASURY EMPLOYEES
UNION, AND THE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION FOR
LEAVE TO FILE A BRIEF *AMICI CURIAE* IN
SUPPORT OF PETITIONER

As counsel of record for *amici curiae* the Women's Legal Defense Fund, Older Women's League, Federally Employed Women, National Treasury Employees Union, and National Employment Lawyers Association,¹ the American Association of

¹ The interests of the other *amici* are set forth in the brief. In an effort to save the Court's time, their interests will not be fully stated here; it need only be said that all *amici* are legitimately concerned about the conflict between the circuits concerning the application of the after-acquired evidence doctrine.

Retired Persons (AARP), 601 E Street, N.W., Washington, DC, 20049, respectfully moves for leave to file a brief amici curiae in support of Petitioner.

In support of this motion AARP declares:

1. AARP is a non-profit membership organization of more than 33 million persons age fifty and older. In representing the interests of its members, AARP seeks to: enhance the quality of life of older Americans through service, advocacy, education and volunteer efforts.

2. Approximately 14 million of AARP's members are employed individuals age fifty and older, most of whom are protected by the Age Discrimination in Employment Act of 1967, as amended, (ADEA), 29 U.S.C. § 621 et seq., and Title VII of the Civil Rights Act, as amended (Title VII), 42 U.S.C. § 2000e et seq.

3. One of AARP's primary goals is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies toward work and retirement. AARP seeks to: (1) assist employers to recruit, train, and retain an aging and increasingly diverse work force, (2) help empower persons to make informed employment and retirement decisions, and (3) advocate enforcement of non-discriminatory rules, policies, and practices related to age in the workplace.

4. AARP's advocacy efforts are made through legislative, administrative and judicial action, including litigation under the ADEA. Since March 1985, AARP has filed more than seventy-five amicus curiae briefs in the United States Supreme Court, Courts of Appeals, and District Courts on employment and benefits issues.

5. This litigation presents a critical issue of law regarding the enforcement of the ADEA and Title VII. The brief of the amici curiae focuses on the conflict among the circuits regarding the application of the after-acquired evidence doctrine and the doctrine's impact on the enforcement of the ADEA and Title VII.

6. The resolution of the legal issues raised in this petition for certiorari will have an impact extending far beyond the parties in this litigation. The decision below has an adverse impact on the public interest in the enforcement of the ADEA and Title VII and on the rights of workers. For these reasons, the issue raised herein is of critical importance to AARP, its members, and to the other amici.

7. Counsel for Petitioner has consented to the filing of an amicus curiae brief by AARP.

8. Counsel for Respondent has denied consent to AARP's filing this amici curiae brief.

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May 5, 1994

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE <i>AMICI CURIAE</i>	1
REASONS FOR GRANTING THE WRIT	3
I. A CONFLICT EXISTS BETWEEN THE CIRCUITS AND A PLETHORA OF TESTS ARE USED IN ANALYZING THE APPLICABILITY OF AFTER-ACQUIRED EVIDENCE.	3
A. The Sixth And Tenth Circuit's "Complete Bar" Rule Conflicts With The Eleventh Circuit's Two-Step Approach.	3
B. By Granting <u>Certiorari</u> In June 1993 In <u>Milligan-Jensen</u> , The Court Has Recognized That The Conflicting Approaches To The After-Acquired Evidence Doctrine Demand Review.	7
II. THE COMPLETE BAR RULE USED BY THE SIXTH AND TENTH CIRCUITS UNDERMINES THE PURPOSES OF THE ADEA AND OTHER CIVIL RIGHTS STATUTES. 10	
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<u>ABF Freight System, Inc. v. NLRB</u> , 114 S. Ct. 835 (1994)	9, 10
<u>Albemarle Paper Co. v. Moody</u> , 422 U.S. 405 (1975)	10, 11
<u>Bazzi v. Western and Southern Life Ins.</u> , 808 F. Supp. 1306 (E.D. Mich. 1992)	10-11
<u>Boyd v. Rubbermaid</u> , 1992 WL 404398 (W.D. Va. 1992)	7
<u>Griggs v. Duke Power Co.</u> , 401 U.S. 424 (1971)	11
<u>Johnson v. Honeywell Information Systems</u> , 955 F.2d 409 (6th Cir.)	5, 9
<u>Kristufek v. Hussmann Foodservice Co.</u> , 985 F.2d 364 (7th Cir. 1993)	7
<u>Lloyd v. Georgia Gulf Corp.</u> , 961 F.2d 1190 (5th Cir. 1992)	4
<u>Lorillard v. Pons</u> , 434 U.S. 575 (1978)	10
<u>Massey v. Trump's Castle Hotel & Casino</u> , 828 F. Supp. 314 (D.N.J. 1993)	<i>passim</i>
<u>McKennon v. Nashville Banner Publishing</u> , 797 F. Supp. 604 (M.D. Tenn. 1992), <i>aff'd</i> , 9 F.3d 539 (6th Cir. 1993)	5, 8, 9

<u>Milligan-Jensen v. Michigan Technological Uni.</u> , 925 F.2d 302 (6th Cir. 1992), <i>cert. granted</i> , 113 S. Ct. 2991, <i>cert. dismissed</i> , 114 S. Ct. 22 (1993)	<i>passim</i>
<u>Moodie v. Federal Reserve Bank of N.Y.</u> , 831 F. Supp. 333 (S.D.N.Y. 1993)	5
<u>O'Day v. McDonnell Douglas</u> , 784 F. Supp. 1466 (D. Ariz. 1992)	11
<u>O'Driscoll v. Hercules, Inc.</u> , 745 F. Supp. 656 (D. Utah 1990)	6
<u>Price Waterhouse v. Hopkins</u> , 490 U.S. 228 (1989)	10, 11
<u>Puhy v. Delta Air Lines</u> , 833 F. Supp. 1577 (N.D. Ga. 1993)	3, 4, 7
<u>Russell v. Microdyne Corp.</u> , 830 F. Supp. 305 (E.D. Va. 1993)	7
<u>Smallwood v. United Air Lines</u> , 728 F.2d 614 (4th Cir.), <i>cert. denied</i> , 469 U.S. 832 (1984)	4
<u>Smith v. Equitable Life Assurance Soc.</u> , 1993 WL 15485, at *4 (S.D.N.Y. 1993)	11-12
<u>Smith v. General Scanning, Inc.</u> , 876 F.2d 1315 (7th Cir. 1989)	4, 7
<u>Summers v. State Farm Mutual Automobile Insur. Co.</u> , 864 F.2d 700 (10th Cir. 1988)	5, 9, 11
<u>United States v. N.L. Indus.</u> , 479 F.2d 354 (8th Cir. 1973)	11
<u>Wallace v. Dunn Const. Co., Inc.</u> , 968 F.2d 1174 (11th Cir. 1992)	6, 7, 10, 11

<u>Washington v. Lake County, Ill.</u> , 969 F.2d 250 (7th Cir. 1992)	6, 7
<u>Western Air Lines, Inc. v. Criswell</u> , 472 U.S. 400 (1985)	10

STATUTES

Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 <u>et seq.</u>	<i>passim</i>
Tennessee Human Rights Act, Tenn. Code Ann. 74-2101 <u>et seq.</u>	8
Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e <u>et seq.</u>	<i>passim</i>

MISCELLANEOUS

Sixth Circuit Joint Appendix, McKennon Affidavit	8
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**BRIEF AMICI CURIAE OF THE AMERICAN
ASSOCIATION OF RETIRED PERSONS, WOMEN'S
LEGAL DEFENSE FUND, OLDER WOMEN'S LEAGUE,
FEDERALLY EMPLOYED WOMEN, NATIONAL
TREASURY EMPLOYEES UNION, AND NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT
OF PETITIONER**

INTERESTS OF AMICI CURIAE

The American Association of Retired Persons (AARP) is a non-profit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and Title VII, 42 USC § 2000e et seq. of the Civil Rights Act of 1964 (Title VII). One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has participated as

amicus curiae in numerous discrimination cases before this Court and the federal courts of appeals.

The Women's Legal Defense Fund (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. The WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. In pursuit of this objective, WLDF has participated as amicus curiae in numerous discrimination cases before this Court.

The Older Women's League is a non-profit membership organization whose primary mission is to advance the status of midlife and older women. Although midlife and older women represent the fastest growing segment of the workforce, they continue to be underpaid and face the combined obstacle of age and sex discrimination.

Federally Employed Women, Inc. (FEW) is a non-profit, membership organization which represents over one million active and retired women employed by the federal government. Since its inception in 1968, FEW has developed programs which focus on two primary goals: to eliminate sex discrimination and sexual harassment and enhance career opportunities for women in government.

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents approximately 150,000 federal employees nationwide. In addition to serving as their collective bargaining representative, NTEU frequently represents employees in administrative and judicial proceedings seeking to vindicate their rights under the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964 (Title VII).

The National Employment Lawyers Association (NELA) is a national bar association of over 1800 lawyers who regularly represent employees in employment-related disputes. NELA

members thus represent many victims of age discrimination. NELA has a compelling interest in ensuring that the ADEA goal of eradicating employment discrimination is fully realized.

All amici are vitally interested in the application of the after-acquired evidence doctrine to employment discrimination cases and are concerned about the conflict between the circuits on this issue.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because: (1) there is a serious conflict between the circuits about the applicability of after-acquired evidence in employment discrimination cases, and (2) the test used by the Sixth and Tenth Circuits fundamentally undermines the deterrent and make-whole purposes of the ADEA, Title VII, and the other civil rights statutes.

I. A CONFLICT EXISTS BETWEEN THE CIRCUITS AND A PLETHORA OF TESTS ARE USED IN ANALYZING THE APPLICABILITY OF AFTER-ACQUIRED EVIDENCE.

A. The Sixth And Tenth Circuit's "Complete Bar" Rule Conflicts With The Eleventh Circuit's Two-Step Approach.

A morass of conflicting tests and unclear holdings exist in the area of after-acquired evidence in the employment discrimination context.¹ Three circuits, the Sixth, Tenth and Eleventh, have squarely addressed the issue of after-acquired evidence in the

¹ "The circuit courts have not spoken with one voice on the use of such evidence." Puhy v. Delta Air Lines, 833 F. Supp. 1577, 1581 (N.D. Ga. 1993). "Indeed, the circuits are divided on this issue." Milligan-Jensen v. Michigan Technological Univ., 925 F.2d 302, 304 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993).

employment discrimination context² and three other circuits have addressed the issue less directly.³

However treacherous and slippery the path through this case law mire, the decisions can be grossly divided into two groups. The two broad categories into which all decisions fall are those which use such evidence to completely bar any recovery by plaintiff and those which do not.⁴ The Sixth and Tenth Circuits

² But see, Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 320 (D.N.J. 1993), where the court indicates that in addition to these three circuits, the Seventh Circuit has also spoken directly on the issue.

³ At least three circuits have indirectly weighed in on this issue without much explanation. In Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984), the Fourth Circuit adopted a modified complete bar rule in cases where the employer would have made the same decision (refusal to hire or discharge) at issue in the case. In Lloyd v. Georgia Gulf Corp., 961 F.2d 1190 (5th Cir. 1992) (age discrimination under state law), the Fifth Circuit affirmed the district court's refusal at trial to permit an employer to admit after-acquired evidence of an employee's job performance to support its reasons for terminating plaintiff. This opinion implicitly places the Fifth Circuit into the Eleventh Circuit's "no complete bar" group. Two Seventh Circuit cases in which the issue was addressed are: Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992) (affirming summary judgment for employer in Title VII termination case where resume fraud was such that plaintiff would have been fired earlier had employer known the truth) and Smith v. General Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989) (resume fraud does not preclude ADEA plaintiff from establishing *prima facie* case but summary judgment for employer affirmed on other grounds).

⁴ The courts even differ as to the number of tests that they believe are in use. Compare Puhy v. Delta Air Lines, 833 F. Supp. 1577, 1581 (N.D. Ga. 1993) (three tests) with Massey v. Trump's Hotel & Casino, 828 F.Supp. 314, 318-322 (D.N.J. 1993) (four tests). We use a two-category analysis in this brief simply for clarity. There are certainly variations, which could be considered separate tests, within the latter "no complete bar group."

have adopted a "complete bar" rule that, even presuming that plaintiff has established a *prima facie* case of discrimination, denies the plaintiff any recovery whatsoever.⁵ This directly conflicts with the Eleventh Circuit's two-step approach ("no complete bar") that permits after-acquired evidence to be used only in determining which remedies may be available to a prevailing plaintiff. Within this latter "no complete bar" group, courts use various two-step tests -- first to determine whether a violation has occurred and second, given the after-acquired evidence against a plaintiff who has proved his/her case, to determine what remedies are available. See, e.g., Moodie v. Federal Reserve Bank of N.Y., 831 F. Supp. 333, 336 (S.D.N.Y. 1993).

Petitioner seeks review of a decision of the Sixth Circuit Court of Appeals which, along with the Tenth Circuit, utilizes the most harsh approach. These courts permit the after-acquired evidence rule to completely shield a discriminating employer from a determination of liability and an assessment of damages. When the employer can show that the after-acquired evidence was such that the plaintiff would not have been hired or would have been fired had the employer known of it,⁶ the employer is totally

⁵ Summers v. State Farm Mut. Auto. Insur. Co., 864 F.2d 700 (10th Cir. 1988) is the seminal case for the rule that mandates that material after-acquired evidence is a complete bar to an employment discrimination plaintiff's right to be awarded any remedies even assuming that discrimination occurred. This test adopted by the Sixth Circuit in Johnson v. Honeywell Information Systems, 955 F.2d 409, 415 (6th Cir.), and reaffirmed in Milligan-Jensen, 975 F.2d at 304 and the instant case, will be referred to herein as the "complete bar" test. McKennon v. Nashville Banner Publishing, 797 F. Supp. 604 (M.D. Tenn. 1992) (McKennon I), aff'd., 9 F.3d 539 (6th Cir. 1993) (McKennon II).

⁶ One of the disturbing aspects of the after-acquired evidence doctrine's use is the frequent acceptance by the courts of self-serving employer affidavits as the sole and conclusive proof of what the employer *would* have done if only it had known about the after-acquired evidence. In the instant case, the district court accepted the Respondent's President's affidavit as proof that it would have terminated her had it known of her photocopying activities. McKennon I, App. 16a. See

immunized from liability for the discrimination. Courts employing this complete bar analysis presume that the employee has not been injured by the discrimination. Milligan-Jensen, 975 F.2d at 305.⁷ Thus, the existence of the discrimination is deemed irrelevant, no liability determination is made, and no remedies are available to plaintiff.

In sharp contrast to the complete bar rule, a two-step test is used by the Eleventh Circuit.⁸ This approach balances an "employer's lawful prerogatives and the restoration of the discrimination victim." Wallace, 968 F.2d at 1181. The Eleventh Circuit's standard does not allow after-acquired evidence to preclude a liability determination; the evidence is only utilized in analyzing which remedies are available to a prevailing plaintiff.

Not only do courts "differ over whether such evidence should preclude the entire claim or only the remedies of reinstatement and front-pay," they also differ as to "whether any distinction must be

Washington v. Lake County, Ill., 969 F.2d 250, 252 (7th Cir. 1992) (affidavits by two of employer's managers accepted as proof plaintiff would have been fired had employer known about errors on her application form even though employer had never before discovered falsifications on an application); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990) (employer's affidavits accepted as proof plaintiff would have been terminated).

⁷ But see Massey, 828 F. Supp. at 322. Referring to discriminatory discharges, the court stated, "It is problematic at best to say there has been no injury in the face of proven illegal conduct Absent illegal motives, the employee would still be employed. Thus, an illegal discharge causes an injury regardless of an employee's previous misconduct, and that injury must be subject to same redress." [footnote omitted]. Petitioner, like the plaintiff in Massey, brought a termination claim. Due to her thirty-nine year highly-rated performance with Respondent, we assert that absent the discrimination Petitioner would still be employed. Thus, an argument that she was not injured by the discrimination is spurious.

⁸ Wallace v. Dunn Const. Co., Inc., 968 F.2d 1174 (11th Cir. 1992).

drawn between employee misconduct in falsifying an employment application ['resume fraud'] and misconduct that occurred during the plaintiff's tenure as an employee." Massey, 828 F. Supp. at 318; see, e.g., Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992) (whether the after-acquired evidence is resume fraud or job misconduct does not matter; the applicable standard is whether the employer would have fired plaintiff if it had known of the misconduct); Puhy, 833 F. Supp. at 1581 (Wallace analysis not directly applicable to instant case since Wallace was a wrongful termination case and this case concerns the failure to hire); Boyd v. Rubbermaid, 1992 WL 404398 (W.D. Va. 1992) (court denies employer's summary judgment motion in Equal Pay Act case with both types of after-acquired evidence -- resume fraud and post-hire misconduct; court makes no distinction between the two).

In addition, when prevailing plaintiffs are deemed eligible for backpay, the courts differ as to the time period for which recovery is available. Some courts calculate back pay at the time the after-acquired evidence is discovered, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 371 (7th Cir. 1993), and others deem backpay awards to include the time elapsed through the date of judgment. Wallace, 968 F.2d at 1182; Smith v. General Scanning, Inc., 876 F.2d at 1319 n.2; Massey, 828 F. Supp. at 323. There are even inconsistencies among district courts within the same circuit.⁹ This morass compels review and resolution by this Court.

B. By Granting Certiorari In June 1993 In Milligan-Jensen, The Court Has Recognized That The Conflicting Approaches To The After-Acquired Evidence Doctrine Demand Review.

Less than a year ago, the Court acknowledged the conflict between the courts of appeals regarding the use of the after-

⁹ Compare e.g., Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993) with Boyd v. Rubbermaid, 1992 WL 404398 (W.D. Va. 1992) and Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992) with Puhy v. Delta Air Lines, 833 F. Supp. 1577 (N.D. Ga. 1993).

acquired evidence doctrine in employment discrimination cases by granting certiorari in another Sixth Circuit case, Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), cert. granted, U.S. 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993) (Title VII). However, because that case settled before briefing or argument, the Court was unable to address the serious conflict in the circuits presented by the after-acquired evidence doctrine. This case, like Milligan-Jensen, presents the Court with an ideal opportunity to resolve the ongoing conflict.

The instant case is very similar to Milligan-Jensen; both are Sixth Circuit employment discrimination cases for which the after-acquired evidence was deemed a complete bar "to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence." McKennon II, App. 6a. (footnote omitted).

Petitioner Christine McKennon, who was age sixty-two when terminated, had worked for thirty-nine years for Respondent newspaper, primarily as a secretary. McKennon II, App. 2a. Her employer had "consistently evaluated her work performance as excellent." Id. She was terminated in 1990 and brought suit in 1991 alleging that her termination was the result of age discrimination under the ADEA and the Tennessee Human Rights Act, Tenn. Code Ann. 74-21-101 et seq., McKennon I, App. 11a.

McKennon had become fearful of losing her job more than a year before her termination. Sixth Circuit Joint Appendix, McKennon Affidavit, p. 94. The fear was created by several factors, including statements from her supervisor, Respondent's Comptroller, that employee terminations were imminent due to dire financial circumstances. Id. Moreover, the Comptroller repeatedly asked her about her retirement plans and sua sponte presented her with detailed information about her retirement benefits. Id.

In response to her supervisor's comments, McKennon photocopied several pages of financial documents and the severance package negotiated by a terminated employee. See McKennon I, App. 11a. Later, she took these papers home to discuss them with her husband. These papers were some of the

many papers she maintained in her office during the normal course of business and to which she had legitimate access. More than half a year after McKennon copied the papers, she was terminated. At the time of her termination, Respondent had no knowledge of her photocopying activities.

Within days of McKennon's deposition testimony about her photocopying, and yet more than fourteen months after her termination, Respondent sent her a self-serving "termination" letter based on the misconduct revealed at the deposition. See McKennon II, App. 2a. The district court, relying on Summers and Johnson, granted Respondent's motion for summary judgment, precluding relief for McKennon, even assuming she had been subjected to age discrimination. McKennon I, App. 13a-18a. The Sixth Circuit affirmed. The Sixth Circuit reiterated its prior adoption of the Summers complete bar rule. McKennon II, App. 5a-7a. Since the employer claimed that it would have terminated McKennon had it known of her misconduct, the court ruled that the misconduct had made her ineligible to receive any remedy whatsoever. The court also found that the alleged nexus between McKennon's misconduct and the discrimination claim was irrelevant to the application of the after-acquired evidence doctrine. McKennon II, App. 8a.

The need for review of this case by the Court is also heightened by the decision in ABF Freight System, Inc. v. NLRB, 114 S. Ct. 835 (1994). In ABF Freight System, a decision in which all the Justices concurred, the Court held that the National Labor Relations Board (NLRB) did not abuse its discretion in providing make whole relief to a plaintiff who was discharged because of his union activities and who was later proven to have lied during NLRB proceedings. In rejecting the employer's after-acquired evidence arguments, the Court noted,

[W]e cannot say that the Board's remedial order in this case was an abuse of its broad discretion or that it was obligated to adopt a rigid rule that would foreclose relief in all comparable cases. Nor can we fault the Board's conclusions that [the employee's] reason for being late to work was ultimately irrelevant to whether antiunion animus

actually motivated his discharge and that ordering effective relief in a case of this character promotes a vital public interest.

ABF Freight System, 114 S. Ct. at 840. Surely, the proper use of after-acquired evidence in employment discrimination cases is as vital to the public interest as it is in the labor relations context.

The Court's recognition of the need to address the after-acquired evidence doctrine is demonstrated by its acceptance of review in Milligan-Jensen and ABF Freight System. There remains a serious split between the circuits as to the application of the after-acquired evidence doctrine to a wide range of employment cases. Similarly, this case is worthy of review by the Court.

II. THE COMPLETE BAR RULE USED BY THE SIXTH AND TENTH CIRCUITS UNDERMINES THE PURPOSES OF THE ADEA AND OTHER CIVIL RIGHTS STATUTES.

Employment discrimination is against public policy and harmful to society as a whole. See Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985); Price Waterhouse v. Hopkins, 490 U.S. 228, 264-65 (1989) (O'Connor, J., concurring). Congress enacted both the ADEA and Title VII to deter unlawful employment discrimination and to make discrimination victims whole for their injuries. See Lorillard v. Pons, 434 U.S. 575 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Accordingly, an employee's right to work free of discrimination derives from the civil rights statutes themselves,¹⁰ not from any contract theory of employment, as

¹⁰ See, e.g., Price Waterhouse, 490 U.S. 228, 264-65 (1989) (O'Connor, J. concurring); Wallace, 968 F.2d at 1181 n.10 ("Title VII and the EPA create standing for [the plaintiff alleging discrimination claims.]"; Bazzi v. Western and Southern Life Ins., 808 F. Supp. 1306 (E.D. Mich. 1992) ("The duty of the employer with respect to refraining from acts of discrimination based on national origin does not arise from

some courts have implied.¹¹ By using after-acquired evidence to deny a plaintiff the opportunity to prove her claim and recover damages, as was done here, both purposes -- deterrence and the restoration of victims to "wholeness" -- are severely undermined. Massey, 828 F. Supp. at 323.

The use of after-acquired evidence as a complete bar to liability has the perverse effect of fostering employer misconduct rather than deterring it. Wallace, 968 F.2d at 1182. Employers will not be inclined to "self-examine and self-evaluate their employment practices."¹² Instead, employers will be encouraged to conduct a thorough *post hoc* review of every document written and every word spoken by plaintiffs in hopes of finding tiny morsels of undesirable information to shield the employers from the consequences of their unlawful activities.

The deleterious effect of the Sixth and Tenth Circuit's complete bar rule in employment discrimination cases cannot be overstated. The use of such evidence eviscerates both the enforcement¹³ and remedial purposes of the ADEA, Title VII and

the [employment] contract, but rather is imposed by [Title VII and the state fair employment statute.]").

¹¹ E.g., Summers, 864 F.2d at 708; O'Day v. McDonnell Douglas, 784 F. Supp. 1466, 1469 (D. Ariz. 1992).

¹² Id., citing Albemarle Paper, 422 U.S. at 417-18, quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) and United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973).

¹³ The complete bar rule interferes with the use of the McDonnell Douglas paradigm in the presentation and refutation of proof of discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (to determine if an illegal motive was present, the employer must be asked "at the moment of the decision what its reasons were" for the action taken); Smith v. Equitable Life Assurance Soc., 1993 WL 15485, at *4 (S.D.N.Y. 1993) ("McDonnell Douglas, which sets forth the shifting burdens in a Title VII case, clearly presupposes a 'legitimate,

other civil rights statutes. The complete bar rule used by courts, such as the Sixth and Tenth Circuits, insulates discriminatory actions by employers against employees. The complete bar rule has a chilling effect on applicants and employees who would otherwise exercise their statutory rights to file charges and institute litigation.¹⁴ In effect, the Sixth Circuit's rule superimposes a "perfect plaintiff" eligibility requirement for enforcing the civil rights laws. There is nothing in the statutory language or legislative history of these laws to support such a prerequisite to recovery.

In short, this court-fashioned rule seriously damages both the remedial and make-whole purposes of the ADEA and Title VII. The rule goes to the very heart of -- indeed the very reasons for -- the existence of the civil rights statutes -- eliminating discrimination and compensating discrimination victims for their injuries.

CONCLUSION

AARP, the Women's Legal Defense Fund, the Older Women's League, Federally Employed Women, the National Treasury Employees Union, and the National Employment Lawyers Association respectfully support Petitioner's writ of certiorari to the Sixth Circuit and respectfully urge the Court to grant review of this case. Such review is imperative to resolve the conflict

nondiscriminatory reason' known to the employer at the time of the employee's discharge.").

¹⁴ "[T]he use of after-acquired evidence to bar a discrimination claim in its entirety could cause employees who did something wrong in the past to quietly endure discriminatory treatment rather than complain, regardless of how long ago the misconduct or its triviality." Massey, 828 F. Supp. at 323.

between the Sixth, Tenth and Eleventh Circuits and to prevent the erosion of the deterrent and "make whole" purposes of the ADEA and Title VII.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

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63 pp

QUESTION PRESENTED

Whether an employer that has violated a federal anti-discrimination law can avoid all liability if, *after* the violation has occurred, new information is discovered which the employer claims would have provided a basis for dismissing the employee *before* the violation.

PARTIES

All of the parties who participated below are set out in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES	ii
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
A. The Proceedings Below	1
B. The Nature of Petitioner's Discrimination Claims	2
C. The After-Acquired Information	4
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. INTRODUCTION	8
II. THE SIXTH CIRCUIT'S AFTER- ACQUIRED INFORMATION RULE FOR DISCRIMINATION CASES IS INCONSISTENT WITH ESTABLISHED PRECEDENT CONCERNING OTHER FEDERAL STATUTES AND EMPLOYEE RIGHTS	13
III. AFTER-ACQUIRED INFORMATION THAT MIGHT WARRANT DISMISSAL OF AN EMPLOYEE DOES NOT PRECLUDE A FINDING OF LIABILITY UNDER THE ADEA	21
IV. AFTER-ACQUIRED INFORMATION THAT MIGHT WARRANT DISMISSAL OF AN EMPLOYEE MAY LIMIT, BUT	

IS NOT A COMPLETE BAR TO, RELIEF UNDER THE ADEA	30
V. THE DECISIONS BELOW MUST BE REVERSED	42
CONCLUSION	49

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
A.A. Superior Ambulance Service, 292 N.L.R.B. 835 (1989)	15, 16
ABF Freight System, Inc. v. NLRB, 510 U.S. ___, 127 L. Ed. 2d 152 (1994)	16, 29, 30, 32
Agbor v. Mountain Fuel Supply Co., 810 F. Supp. 1247 (D. Utah 1993)	25, 46
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	<i>passim</i>
Axelson, Inc., 285 N.L.R.B. 862 (1987)	8, 15, 16
Baab v. AMR Services Corp., 811 F. Supp. 1246 (N.D. Ohio, 1993)	10, 33
Bazzi v. Western and Southern Life Insurance Co., 808 F. Supp. 1306 (E.D.Mich. 1992)	33
Benson v. Quanex Corp., 58 FEP Cas. 743 (E.D. Mich 1992)	33
Big Three Welding Equipment Co., 145 N.L.R.B. 1685 (1964), <i>enforcement granted in part, denied in part</i> , NLRB v. Big Three Welding Equipment Co., 359 F.2d 77 (5th Cir. 1966)	15
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Boyd v. Rubbermaid Commercial Products, 62 FEP Cas. 1228 (W.D. Va 1992)	35, 37
Chrysler Motors v. Allied Ind. Workers, 2 F. 3d 760 (7th Cir. 1993)	13
Churchman v. Pinkerton's, Inc., 756 F. Supp. 515 (D. Kan. 1991)	11, 33
Compton v. Luckenbach Overseas Corp., 425 F.2d 1130 (2d Cir.), <i>cert. denied</i> , 400 U.S. 916 (1970)	19
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East Island Swiss Products, Inc., 220 N.L.R.B. 175 (1975)	15
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983)	10, 26
Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)	32
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	20, 32

George v. Meyers, 1992 WL 97777, (D. Kan. 1992)	25
Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979)	24
Goldberg v. Bama Manufacturing Corp., 302 F.2d 152 (5th Cir. 1962)	<i>passim</i>
Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962)	18
Harris v. Forklift Systems, Inc., 510 U.S. ___, 126 L. Ed. 2d 295 (1993)	33
Hazen Paper Co. v. Biggins, 507 U.S. ___, 123 L. Ed. 2d 338 (1993)	32
Jimenez-Fuentes v. Torres Gaztambide, 807 F.2d 230 (1st Cir. 1985)	10
John Cuneo, Inc., 298 N.L.R.B. 856 (1990)	15, 16, 19
Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409 (6th Cir. 1992)	9, 29, 40
Kristufek v. Hussman Food Service Co., 985 F.2d 364 (7th Cir. 1993)	46
Leahey v. Federal Express Corp., 685 F. Supp. 127 (E.D.Va. 1988)	46
Lloyd v. Georgia Gulf Corp., 961 F.2d 1190 (5th Cir. 1992)	10
Lorillard v. Pons, 434 U.S. 575 (1978)	8, 31, 32, 38

Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993)	<i>passim</i>
Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989)	33
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	43, 45
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)	34
Miller v. Beneficial Management Corp., 844 F. Supp. 990 (D.N.J. 1993)	35
Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), <i>cert. granted</i> , U.S. ___, 125 L. Ed. 2d 686 <i>cert. dismissed</i> , 125 L. Ed. 2d 773 (1993)	<i>passim</i>
Mitchell v. Robert De Mario Jewelry, 361 U.S. 288 (1960)	17
Monell v. Department of Human Services, 436 U.S. 658 (1978)	46
Moyland v. Maries County, 792 F.2d 746 (8th Cir. 1986)	29
Mt. Healthy City School Bd. v. Doyle, 429 U.S. 274 (1977)	<i>passim</i>
NLRB v. Big Three Welding Equipment Co 145 NLRB 1685 (1964).	15
NLRB v. Jacob E. Decker & Sons, 636 F.2d 129 (5th Cir. 1981)	15

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	24, 43, 49
Newport News Shipbuilding and Dry Dock Co. v. Hall, 674 F.2d 248 (4th Cir. 1982)	17, 18
O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992)	37
O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990), <i>aff'd</i> 12 F. 3d 176 (10th Cir. 1994)	10, 11, 48
Omar v. Sea-Land Service, Inc., 813 F.2d 986 (9th Cir. 1987)	18, 19, 29
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	<i>passim</i>
Proulx v. Citibank, 681 F.2d 199 (S.D.N.Y. 1988)	36, 49
Redden v. Wal-Mart Stores, Inc., 832 F. Supp. 1262 (N.D.Ind. 1993)	46
Rich v. Westland Printers, 62 FEP Cas. 379 (D. Md 1993)	35
Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D.Va. 1993)	22, 33
Smith v. General Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989)	13
Spinks v. United States Lines Co., 223 F. Supp. 371 (S.D.N.Y. 1963)	19

St. Mary's Honor Center v. Hicks, 125 L. Ed. 2d (1993)	27, 29, 30
Still v. Norfolk & Western Railway Co., 368 U.S. 35 (1961)	<i>passim</i>
Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700 (1988)	10
Teamsters v. United States, 431 U.S. 324 (1977)	43
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	23, 26
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	22, 32, 38, 39
U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983)	23
Van Deursen v. United States Tobacco Sales Co., 839 F. Supp. 760 (D.Colo. 1993)	25
Village of Arlington Heights v. MHDC, 429 U.S. 252	24, 43
Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992)	<i>passim</i>
Washington v. Lake County, Illinois, 762 F. Supp. 199 (N.D.Ill. 1991)	25, 33
Welch v. Liberty Machine Works, Inc., 1994 WL 169682 (8th Cir. 1994)	36, 45

Statutes:

Pages:

Age Discrimination Employment Act	<i>passim</i>
Title VII, Civil Rights Act of 1964	<i>passim</i>
Tenn. Code Ann. §4-21-101, <i>et seq.</i>	1, 31
28 U.S.C. §1254(1)	1
29 U.S.C. §201, <i>et seq.</i>	31
29 U.S.C. §216(b)	38
29 U.S.C. § 621, <i>et seq.</i>	1
29 U.S.C. §621(a)	20
29 U.S.C. §623(1)	21
29 U.S.C. §626(b)	31, 34
29 U.S.C. §630(b)	22
29 U.S.C. §630(f)	22
29 U.S.C. §631	22
42 U.S.C. §1981a(b)(3)	34

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Pages:

G. Mesritz, "'After-Acquired' Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims", 18 Employee Relations L.J. 215	40, 41
---	--------

Pages:

R.H. White and R. D. Brussack, "The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation", 35 <i>Boston Col. L. Rev.</i> 49 (1993)	10
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BRIEF FOR PETITIONER**JURISDICTION**

The decision of the Sixth Circuit was entered on November 15, 1993. An extension of time until March 30, 1994, for filing this petition was granted by Justice Stevens. Certiorari was granted on May 23, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves the age discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which provides in pertinent part as follows:

§ 623. Prohibition of age discrimination

(a) **Employer practices.** It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

STATEMENT OF THE CASE**A. The Proceedings Below**

This action was filed by petitioner, Christine McKennon, in the United States District Court for the Middle District of Tennessee on May 6, 1991. The complaint alleged that respondent Nashville Banner Publishing Co., her former employer, had discriminated against her in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, and the Tennessee Human Rights Act. Tenn. Code Ann. §4-21-101, *et seq.* (Pet. App. 11a).

Following limited discovery, respondent filed a motion for summary judgment based on petitioner's possession of certain company documents. For the purpose of the motion, the respondent and the courts below assumed that petitioner had been the victim of age discrimination in violation of the ADEA and state law. (Pet. App. 3a).

On June 3, 1992, the district court granted respondent's motion for summary judgment, dismissing the case based on the Sixth Circuit's after-acquired information doctrine. (Pet. App. 10a-18a). The Sixth Circuit affirmed, relying on its earlier decision in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F. 2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L. Ed. 2d 686, *cert. dismissed*, 125 L. Ed. 2d 773 (1993). Under the Sixth Circuit holding in *Milligan-Jensen*, a court is required, even after a finding of an intentional violation of federal law, to dismiss any employment discrimination case where the employer can show that it would have discharged the plaintiff had it been aware of information that only came to light following that violation. (Pet. App. 1a-9a).

B. The Nature of Petitioner's Discrimination Claims

Petitioner was employed by respondent since May, 1951, and held a variety of positions, working primarily as a secretary. At all times her performance was consistently rated as excellent. Respondent dismissed petitioner on October 31, 1990, when she was sixty-two years old. (Pet. App. 10a-11a).

This litigation concerns events which occurred during an eighteen-month period beginning in the spring of 1989, shortly after petitioner was assigned to work as secretary for the company's comptroller, and ending with petitioner's dismissal in the fall of 1990. The complaint alleged that respondent had engaged in three distinct types of discrimination unlawful under the ADEA and state law.

First, the complaint alleged that respondent's officials had systematically harassed petitioner in an effort to force her to retire or resign. Petitioner's benefits and privileges were reduced in a variety of ways. Respondent repeatedly admonished petitioner to retire, alleging that the company was in financial difficulty. Company officials revoked petitioner's parking privileges, reduced her lunch hour privileges, and threatened her with weekend work. (J. App. 7a-8a, 50a-52a).

Second, according to the complaint, respondent discriminated against petitioner in compensation, denying her a routine pay raise, and limiting her compensatory time. (J. App. 7a).

Third, the complaint asserted that petitioner had been dismissed on account of her age. (J. App. 8a-10a). In May, 1990, respondent hired a new secretary, age 36. On October 29, 1990, respondent hired yet another new secretary, age 26.¹ Only two days later, on October 31, 1990, respondent, asserting that it had a surplus of secretaries, dismissed the two oldest secretaries, including petitioner, then 62. (J. App. 9a). Neither of the newly hired younger secretaries was laid off. (J. App. 9a).

Respondent dismissed petitioner in a particularly abrasive manner. After almost forty years with The Banner, petitioner was summoned without warning to a meeting with company officials and notified that she was being summarily discharged. Company officials demanded that petitioner sign on the spot a five page "release agreement" that had been prepared in advance by counsel for the company, and was told that she would forfeit her severance pay if she refused. Petitioner was directed to clean out her desk and leave the building immediately. Petitioner's supervisor

¹Defendant's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 6.

monitored her movements, ushered her to the door, demanded her Banner ID card, and directed her to leave the office. (J. App. 8a-9a).

On the basis of these allegations, the complaint sought four distinct forms of relief: (a) compensatory damages for the humiliation, embarrassment and other injuries occasioned by the deliberate age-based harassment, (b) back pay for losses occasioned by the unlawful discrimination in compensation, (c) back pay, front pay, and other equitable relief to redress the unlawful dismissal, and (d) liquidated damages for respondent's willful violation of the ADEA. (J. App. 10a-11a).

C. The After-Acquired Information

The after-acquired information in this case concerns ten pages of routine but confidential company documents. In the fall of 1989, after company officials had begun to threaten petitioner that she might be laid off because the firm was allegedly facing financial difficulties, the comptroller, Imogene Stoneking, directed petitioner to shred copies of documents which revealed the actual financial condition of the firm. (J. App. 52a-53a, 144a-47a). These included a Profit and Loss Statement, dated October 10, 1989, and a ledger indicating the amounts the privately held firm had been paying to its owners. (J. App. 23a-27a). Before destroying the documents, petitioner copied them.² All the documents into petitioner's possession through the normal course of business, having been either handed to her or maintained by her in her office. At some subsequent point in time petitioner took the ten copied pages to her

²Petitioner also copied from a file maintained in her office three documents related to the status of her former supervisor, Jack Gunter. (J. App. 28a-33a, 148a-150a). In the spring of 1989 petitioner has warned by company officials that they had almost dismissed her when considering whether to dismiss Gunter. (J. App. 50a).

home and showed them to her husband of thirty-six years, but to no one else.

After the commencement of the instant litigation, respondent sought to discover any documents in petitioner's possession that might be relevant to her claims. Counsel for petitioner provided the documents in question to counsel for respondent. Respondent's counsel deposed petitioner regarding her possession of the documents, and then moved for summary judgment.

In support of its motion for summary judgment, respondent submitted similarly worded affidavits from four company officials asserting that they would have dismissed petitioner had they known about the copied documents. The affidavits did not base that assertion on the particular contents of the documents; the affiants did not claim even to know what or how many pages had been copied, but recounted only that they had "been advised" that the materials were "proprietary and confidential documents". (J. App. 35a-45a). The assertions in the affidavits that petitioner would have been fired were based solely on her having "copied and removed" the documents; the affidavits did not rely on the fact that petitioner had shown the materials to her husband. The affidavits acknowledged that petitioner had legitimate access to the documents (J. App. 35a-43a), and did not assert that respondent had in fact been injured by petitioner's action. (See J. App. 71a).

The operative portion of the affidavits was limited to a conclusory assertion that petitioner would have been fired. The affidavits did not purport to describe any company rules regarding the copying or removal of documents, any standards applied by respondent in determining what level of discipline to impose for misconduct, any past disciplinary practices, or the applicable procedures for determining when an employee should be terminated. The circumstances under which the affidavits had been executed were disclosed in subsequent depositions.

The company comptroller, Imogene Stoneking, testified that she knew nothing about the documents issue until an already prepared affidavit was brought to her for her signature. The assertion in Stoneking's affidavit that she "would have terminated" petitioner was written by a third party who could not have discussed the matter with Stoneking herself prior to preparing that affidavit. Stoneking testified that she did not know who had prepared the affidavit. (J. App. 82-83)

In another deposition, respondent's president acknowledged that, when faced with personnel problems like "employees who are not doing their jobs . . . or who had bad attitude problems", it had been the practice to respond only with a "[s]uspension of wage increases" or a "supervisor sitting down with them". (J. App. 70a-71a). Errant employees were warned "that if they don't straighten up, termination will follow." (J.App. 71a). The president conceded that in the previous five years there had not been a single instance in which an employee had been summarily terminated for misconduct. CJ.App. 70a).

Respondent's motion for summary judgment precipitated a vigorous and at times bitter factual dispute about whether petitioner would in fact have been dismissed for copying and removing the documents. The central issue, as respondent acknowledges, was whether petitioner's wrongdoing was "serious enough" to have led to summary dismissal. (R. Br. Op. 3). Petitioner testified that she understood a secretary could be fired only for making public a confidential document. (J. App. 133a, 155a).

The district court understandably did not purport to resolve on summary judgment this factual dispute. Rather than decide whether petitioner would in fact have been dismissed--a factual matter that clearly would have had to be resolved by a jury in this ADEA case--the district judge made two other quite different findings. First, the district court held that respondent *could* reasonably have fired petitioner for removing the documents, asserting that her

actions "provid[e] adequate and just cause for her dismissal as a matter of law." (Pet. App. 17a). Second, apparently believing that petitioner bore the burden of proof on this issue, the trial judge asserted that she had failed to adduce "evidence tending to prove that the Banner would have continued her employment had it learned of her misconduct prior to her termination." (Id.) The court of appeals asserted, inexplicably and incorrectly, that respondent's assertion that it would have dismissed petitioner was "undisputed." (Pet. App. 2a).

SUMMARY OF ARGUMENT

This Court has previously held that an employer that violates the federal rights of an employee cannot avoid liability by proving that it would have fired, or not hired, that employee had it been aware of misconduct on his or her part. *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35 (1961). The National Labor Relations Act and numerous other laws have been similarly construed. Anti-discrimination statutes should not be interpreted in a different manner.

After-acquired information which, if known, would have led to an employee's dismissal cannot render lawful acts that were in fact taken with a discriminatory motive. A legitimate reason can only affect the legality of an adverse employment action if it was a reason that the employer had in mind "at the time of the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

Where a violation of the ADEA has been proven, after-acquired information cannot operate as a complete bar to all relief. The ADEA expressly incorporates the remedial

principles of the Fair Labor Standards Act. Prior to the adoption of the ADEA, the FLSA had been construed not to contain any such bar to relief. *Goldberg v. Bama Manufacturing Corp.*, 302 F. 2d 152 (5th Cir. 1962). The ADEA is presumed to incorporate such pre-existing interpretations of the FLSA. *Lorillard v. Pons*, 434 U.S. 575 (1978).

If an employer seeks to invoke after-acquired evidence in an ADEA or Title VII case, it must prove both that it would have dismissed the plaintiff on the basis of that information, and that it would have discovered the information in the absence of discrimination. Where the employer meets that burden, the defense will bar reinstatement and front pay, and in a discriminatory discharge case will cut off back pay as of the date on which the information would have been discovered. After-acquired information will not, however, affect compensatory damages for age-based, racial or sexual harassment, awards of liquidated damages or punitive damages, or back pay awards for discrimination in compensation.

ARGUMENT

I. INTRODUCTION

The issue presented by this case is whether an employer that has violated a federal anti-discrimination law can avoid all liability if, *after* the violation has occurred, new information³ is discovered which the employer claims would

³The National Labor Relations Board, which has dealt repeatedly with this issue, aptly refers to it as "involving a[n] . . . employer's after-acquired knowledge." *Axelson, Inc.*, 285 NLRB 862, 866 n. 11 (1987). Some courts refer to this situation as one involving after-acquired "evidence". Virtually none of these cases, however, involve

have provided a basis for dismissing the employee *before* the violation.⁴

The Sixth Circuit applies a *per se* rule, holding that after-acquired information of this type provides the employer with an absolute and total defense:

[A]fter-acquired evidence is *a complete bar* to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence.

(Pet. App. 6a)(Emphasis added).⁵ Under this *per se* rule, if the after-acquired information is adduced following a judicial finding of a violation, the court must as a matter of law deny all relief. *Milligan-Jensen v. Michigan Technological University*, 975 F. 2d 302 (6th Cir. 1992). If the information is offered prior to trial, the court is precluded as a matter of law from even inquiring whether a violation of federal law has occurred. The same absolute defense is recognized in

newly found evidence supporting the reason already adduced by the employer for the disputed adverse action. Rather, the claim generally advanced by employers is that they have found information supporting an entirely new reason for dismissing the employee that is distinct from the reason originally proffered for the discharge or other disputed action.

⁴We explain in part V, *infra*, that the issue of whether the employer in this case would in fact have discharged petitioner cannot be resolved at this stage in the proceedings.

⁵See also *id.* at 4a (such after-acquired information "mandates judgment as a matter of law for an employer charged with discrimination"); *Dotson v. United States Postal Service*, 977 F. 2d 976, 968 (6th Cir. 1992) (such after acquired information "precludes the grant of any present relief or remedy") (emphasis added); *Johnson v. Honeywell Information Systems, Inc.*, 955 F. 2d 409, 415 (6th Cir. 1992) (plaintiff "is entitled to no relief, even if she could prove a violation.")

the Tenth Circuit.⁶ This per se rule has been aptly described by two commentators as a form of "absolution."⁷

A number of other circuits have declined to apply the per se rule.⁸ The Eleventh Circuit has emphatically rejected both the rule and the reasoning of the Sixth and Tenth Circuit cases. *Wallace v. Dunn Construction Co.*, 968 F. 2d 1174 (11th Cir. 1992).⁹ Rather than apply any per se rule, *Wallace* treats after-acquired information as one of the factors to be considered in a traditional assessment of what remedy is necessary to place a victim of unlawful

⁶*O'Driscoll v. Hercules, Inc.*, 12 F. 3d 176 (10th Cir. 1994); *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F. 2d 700 (1988).

⁷R.H. White and R. D. Brussack, "The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation", 35 *Boston Col. L. Rev.* 49, 52 (1993); see also *Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1182 (11th Cir. 1992)(per se rule has "the perverse effect of providing a windfall to employers"); *Baab v. AMR Services Corp.*, 811 F. Supp. 1246, 1260 n. 5 (N.D. Ohio, 1993)(applying the Sixth Circuit per se rule while acknowledging, "The troubling aspect of this doctrine is that it can very well lead to penalty free discrimination by an employer.")

⁸In addition to the Eleventh Circuit decision in *Wallace*, see *Lloyd v. Georgia Gulf Corp.*, 961 F. 2d 1190, 1197 (5th Cir. 1992)(employer may not rely on information known only to company official other than the supervisor who had dismissed the plaintiff); *Jimenez-Fuentes v. Torres Gaztambide*, 807 F. 2d 230, 233 (1st Cir. 1985)(after-acquired information relevant only insofar as plaintiff seeks injunction against future demotions); *Eastland v. Tennessee Valley Authority*, 704 F. 2d 613, 626 (11th Cir. 1983)(employer cannot defeat hiring discrimination claim of black applicant with evidence that white hired was better qualified, where employer was unaware of those superior qualifications at the time the hiring decision was made.)

⁹A similar analysis is set out in *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993).

discrimination in the position he or she would have occupied "but for" a proven statutory violation. 968 F.2d at 1179-82. *Wallace* concludes that such after-acquired information will limit or preclude some remedies, while not affecting other forms of relief. 968 F. 2d at 1181-83.

Prior to 1989, when after-acquired information was generally accorded only the limited significance reflected in decisions like *Wallace*, there were few reported cases in which employers raised this issue. Since the emergence of the per se rule, however, there has been a dramatic increase in litigation regarding after-acquired information. In recent years there have been more than fifty reported decisions considering employer claims that they would have dismissed employment discrimination plaintiffs had they known of facts actually learned only after the proven or alleged violations of federal law. As a result of this new and total defense, the primary focus of many anti-discrimination cases is no longer on the particular motives that prompted an employer to take a specific disputed action, but on the work histories and lives of the victims of unlawful discrimination.¹⁰

There are four principal areas in which the conflicting lower court views regarding after-acquired

¹⁰See, e.g., *O'Driscoll v. Hercules, Inc.*, 12 F. 3d 176 (10th Cir. 1994)(litigation regarding after-acquired information that plaintiff had made inaccurate statements in an application submitted in 1980, six years before the alleged act of discrimination, and ten years before employer raised the issue); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 326 (D.N.J. 1993)(employer contends it would have denied plaintiff a promotion in 1989 had it known that the plaintiff, while employed as a police officer in 1968, had mislaid his weapon); *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515 (D. Kan. 1991) (discussing in detail after-acquired information that plaintiff had lived at 12 different addresses since graduating from high school, had moved twice to be with her husband when he changed jobs, and while in high school had been fired from a job at a drive-in movie theater.)

information affect differently the outcome of particular cases.

(1) The per se rule bars any relief for claims of harassment on the basis of age, race or gender, including sexual harassment. *Wallace* holds, on the other hand, that remedies for such violations are not ordinarily affected.

(2) The per se rule bars any relief for claims that a plaintiff was paid less than others doing comparable work solely because of his or her age, race or sex. Under *Wallace*, on the other hand, remedies for wage discrimination are not affected.

(3) The per se rule bars, in cases in which they would otherwise be appropriate, awards of punitive damages, or of the liquidated damages¹¹ required in ADEA cases for "willful" violations. Under *Wallace* these remedies remain available despite any after acquired-information.

(4) The per se rule bars all back pay whatever for a discriminatory discharge. Under *Wallace*, after-acquired information may well affect the amount of a back pay award. Depending on the circumstances, the information may significantly reduce, virtually eliminate, or have no impact on the back pay awarded.

On the other hand, under both lines of cases, albeit for somewhat different reasons, after-acquired information that

¹¹The petitioner in this case alleged that she had been harassed and paid less because of her age, and sought such an award of liquidated damages.

would have led an employer to dismiss an employee will preclude reinstatement or front pay.¹³

II. THE SIXTH CIRCUIT'S AFTER-ACQUIRED INFORMATION RULE FOR DISCRIMINATION CASES IS INCONSISTENT WITH ESTABLISHED PRECEDENT CONCERNING OTHER FEDERAL STATUTES AND EMPLOYEE RIGHTS

The circumstance presented by this case is one which has arisen repeatedly under other federal statutes regulating relations between employers and employees. In cases raising this issue outside the context of anti-discrimination laws, it is well established that an employer cannot avoid liability on the basis of after-acquired information.

In *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35 (1961), this Court rejected just such a per se defense to the Federal Employers' Liability Act.¹⁴ The plaintiff in *Still* had sustained back injuries in the course of his employment. The FELA provides railroad employees with a right to compensatory damages for such personal injuries. The employer asserted as a defense the fact that the plaintiff, in order to obtain employment, had made certain false

¹³*Wallace v. Dunn Construction Co.*, 968 F. 2d at 1181-82. A number of decisions explain that reinstatement would simply make no sense since the employer would ordinarily be free to terminate the plaintiff immediately on the basis of the after-acquired information. *Smith v. General Scanning, Inc.*, 876 F. 2d 1315, 1319 n. 2 (7th Cir. 1989); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 323 (D.N.J. 1993); cf. *Chrysler Motors v. Allied Ind. Workers*, 2 F. 3d 760 (7th Cir. 1993).

¹⁴368 U.S. at 35 ("The question this case presents is whether a railroad can escape th[e] statutory liability by proving that an employee . . . had obtained his job by making false representations upon which the railroad rightfully relied in hiring him.")

statements to the railroad regarding his physical condition. The employer contended that a worker who held his position solely because the railroad was unaware of the falsity of those statements should not be considered "employed" for the purposes of the FELA. 368 U.S. at 36. This Court rejected that argument, explaining that, save in the most extraordinary of circumstances,

the terms "employed" and "employee" as used in the Act must, in all cases . . . be interpreted according to their ordinary meaning, and the status of employees who become such through . . . fraud, although possibly subject to termination . . . must be recognized for purposes of suits under the Act.

368 U.S. at 45. The Court quoted with approval a lower court opinion insisting that the law could not mean "that every fraudulent violation of the rules . . . would render such employment void, and deny the defrauding employee any rights under the act." 368 U.S. at 38 (quoting the unreported district court opinion affirmed in *Minneapolis St. P. etc. R. Co. v. Borum*, 286 U.S. 447 (1932)). Eight members of the Court rejected the objection of the sole dissenting justice that an award to Still under the FELA would enable him to "profit from his own wrong." 368 U.S. at 50, 51.

The National Labor Relations Board has faced this same situation in enforcing the National Labor Relations Act. In a series of decisions over a period of almost thirty years, the NLRB has repeatedly awarded back pay to employees dismissed in violation of federal labor law, even though recognizing that the employers in question would have dismissed those employees on other grounds had they been aware of unrelated misconduct on the part of those

workers.¹⁵ The Board's practice has been to award back pay from the date of the unlawful dismissal until the date on which the employer actually learned it had lawful grounds for dismissal, reasoning that

but for [the employee's] union activities, he would have continued in Respondent's employ at least until such time as Respondent acquired information of his . . . misconduct. It is therefore appropriate, in remedying Respondent's unlawfully motivated discharge . . . , to order Respondent to make [the victim] whole from the date of his discharge to the date it acquired this information.

East Island Swiss Products, Inc., 220 NLRB 175, 175 (1975).¹⁶ The Board has also been unwilling to permit

¹⁵*John Cuneo, Inc.*, 298 NLRB 856, 856 (1990); *A.A. Superior Ambulance Service*, 292 NLRB 835, 835 n. 7 (1989); *Axelson Inc.*, 285 NLRB 862, 866 (1987); *East Island Swiss Products, Inc.*, 220 NLRB 175, 175-76 (1975); *Bird Trucking and Cartage Co., Inc.*, 167 NLRB 626, 630 (1967); *Big Three Welding Equipment Co.*, 145 NLRB 1685, 1704 (1964), *enforcement granted in part, denied in part*, NLRB v. *Big Three Welding Equipment Co.*, 359 F. 2d 77, 82-84 (5th Cir. 1966). In *Bird Trucking* and *Big Three Welding Equipment* the Board also ordered reinstatement. The Fifth Circuit in *NLRB v. Big Three Welding Equipment Co.* upheld the back pay award, but declined to reinstate the employee. See *NLRB v. Jacob E. Decker & Sons*, 636 F. 2d 129, 132 n. 3 (5th Cir. 1981). The Board's decision in *Big Three Welding* was issued in February, 1964, five months before the enactment of Title VII of the 1964 Civil Rights Act.

¹⁶See also *John Cuneo, Inc.*, 298 NLRB 856, 856 (1990) ("The record shows that the Respondent . . . would have continued to employ [the employee] at least until the Respondent became aware of [the employee's] false statement . . ."); *A.A. Superior Ambulance Service*, 292 NLRB 835, 835 n. 7 ("The record clearly demonstrates that, had Skinner refrained from engaging in protected activity, he would have remained employed by the Respondent at least until the Respondent became aware of his misconduct.")

circumstances extraneous to the violation of federal law to immunize the employer from any consequences for its illegal action:

[R]elieving the Respondent of all backpay liability, including for the period when the Respondent had no knowledge of [the employee's misconduct] and had no lawful reason to fire him, would provide an undue windfall for the Respondent.

John Cuneo, Inc., 298 NLRB 856, 856 (1990).¹⁷

In *ABF Freight System, Inc. v. NLRB*, 510 U.S. ----, 127 L.Ed. 2d 152 (1994), this Court upheld the NLRB's closely related practice of awarding the usual remedies of back pay and reinstatement to the victims of unfair labor practices, even where those workers had made false statements to the Board itself. This Court refused to adopt for such cases a "categorical exception" to the usual forms of relief. 127 L. Ed. 2d at 160. The Court properly recognized that such a per se rule might well "force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes" *Id.* In declining to convert the National Labor Relations Act into a scheme for policing employee misconduct, the Court stressed that "other civil and criminal remedies" remained to deal with such problems. *Id.* (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. ---, 127 L. Ed. 2d 152 (1993)).¹⁸

¹⁷*Axelson, Inc.*, 285 NLRB 862, 866 n. 11 (1987) ("We would be granting an undue windfall if we . . . relieved the Respondent of all backpay liability")

¹⁸In *A.A. Superior Ambulance Service*, 292 NLRB 835, 835 n. 7 (1989), the Board referred evidence regarding an errant employee "to the appropriate licensing and drug enforcement agencies."

The Wage and Hour Division of the Department of Labor has long taken a similar position with regard to violations of employee rights under the Fair Labor Standards Act. In *Goldberg v. Bama Manufacturing Corp.*, 302 F. 2d 152 (5th Cir. 1962), the aggrieved worker had been dismissed by her employer for reporting to the Department of Labor violations of the federal minimum wage laws. The Wage and Hour Division brought suit in the name of the then Secretary of Labor, seeking to enforce this Court's decision in *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288 (1960), that victims of such retaliatory dismissal were entitled to monetary redress. The district court denied all relief because the employer had learned after the worker's unlawful dismissal of several other reasons that would certainly have justified her discharge. 302 F. 2d at 154. The Department of Labor successfully appealed to the Fifth Circuit, which held, in language similar to that in *Wallace*, that the law required that an illegally dismissed employee "should be restored, as nearly as possible, to the same situation he would have occupied if he had not been discharged." 302 F. 2d at 156. Even though the circumstances of that case rendered reinstatement inappropriate, the court of appeals insisted that it would be inconsistent with "the purposes of the Fair Labor Standards Act" to "allo[w] the employer to get away scot free", 302 F. 2d at 156, and directed that the unlawfully discharged worker be awarded both back pay and damages. *Id.*

The Benefit Review Board of the Department of Labor has taken the same position with regard to the Longshoremen's and Harbor Worker's Compensation Act, which provides the equivalent of workers' compensation to certain employees. In *Newport News Shipbuilding and Dry Dock Co. v. Hall*, 674 F. 2d 248 (4th Cir. 1982), the employer insisted that it was immunized from any award under the Act by the fact that the injured worker in question had obtained his job by misrepresenting his medical condition. The Administrative Law Judge, however, found

"no provision in the Act relieving an employer of liability in such circumstances", and the Labor Department Benefit Review Board awarded benefits. 674 F. 2d at 249. On the employer's petition for review, the Fourth Circuit sustained the decision of the Board. The court of appeals noted that Congress had written into the statute a number of express limitations and defenses, and refused "to expand the existing exceptions." 674 F. 2d at 251. The court of appeals declined to entertain the employer's argument that any award in such a case would be "inequitable", explaining that "[t]hese are precisely the types of policy arguments that must be presented to and considered by Congress." 674 F. 2d at 252. *Newport News* expressly relied on this Court's decision in *Still*. 674 F. 2d at 254.

The lower courts have also relied on *Still* in refusing to permit shipowner-employers to avoid liability under the Jones Act. In *Gypsum Carrier, Inc. v. Handelsman*, 307 F. 2d 525 (9th Cir. 1962), the plaintiff had fraudulently concealed a variety of illnesses and injuries when he applied for work. The Ninth Circuit nonetheless rejected the employer's contention that such misconduct on the part of the employee should operate as "a general release of the shipowner's obligation" to provide maintenance and cure in the event of injury. 307 F. 2d at 531. Citing this Court's opinion in *Still*, the court of appeals declined to adopt "any general rule which would make fraud at the inception of the" employment relationship a bar to redress for later injury. 307 F. 2d at 530. It warned that such a rule would "stir contentions, cause delays, and invite litigations." 307 F. 2d at 531. The Ninth Circuit reaffirmed that application of *Still* in *Omar v. Sea-Land Service, Inc.*, 813 F. 2d 986 (9th Cir. 1987). The court emphasized that a variety of civil and even criminal proceedings were available to deal with misconduct by seamen, including obtaining a position through fraud.

813 F. 2d at 990. Again relying on *Still*, 813 F. 2d at 989, the Ninth Circuit admonished, "The duties of maritime employers are owed not to perfect contracts, but to imperfect sailors." 813 F. 2d at 990.—See also *Compton v. Luckenbach Overseas Corp.*, 425 F. 2d 1130 (2d Cir.), cert. denied 400 U.S. 916 (1970); *Spinks v. United States Lines Co.*, 223 F. Supp. 371, 371-72 (S.D.N.Y. 1963)(citing *Still*).

None of the lower court opinions applying the Sixth Circuit's per se rule in employment discrimination cases have questioned the correctness of the contrary interpretation of non-civil rights statutes. The Sixth Circuit below did not discuss this Court's opinion in *Still*, and did not dispute the precedents set out above. If the petitioner had sued respondent under any of these other laws, the Sixth Circuit would presumably have permitted her to try her case on the merits.

If, however, *Still*, its progeny, and the federal agency interpretations of these non-civil rights laws are correct, it is difficult to see how the contrary rule can be correct in employment discrimination cases. The reasoning of these decisions interpreting non-civil rights statutes is applicable to anti-discrimination laws. The per se rule applied by the Sixth and Tenth Circuits is remarkably similar to the per se rule rejected by this Court in *Still* and *ABF Freight System*. Respondent in this case has obtained precisely the "undue windfall" which the NLRB rejected as intolerable in *John Cuneo, Inc.*, and has gotten away "scot free", as the Wage and Hour Division cautioned would occur were its interpretation of the law not accepted in *Goldberg*. Precisely as this Court warned in *ABF Freight Systems*, the lower courts in employment discrimination cases have often been diverted from their primary mission of enforcing federal law and have become embroiled in a large number of essentially collateral disputes about alleged employee misconduct.

None of this would matter, of course, if there were a clear and compelling reason to accord to plaintiffs invoking

the ADEA or Title VII a lesser set of remedies, and thus a lesser degree of enforcement, than is already available under the Federal Employers' Liability Act, the National Labor Relations Act, the Fair Labor Standards Act, the Longshoremen's and Harbor Worker's Compensation Act or the Jones Act. But no reason for such a distinction is readily imaginable. The public policies underlying the nation's civil rights laws are matters of "the highest priority." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). Congress enacted the ADEA after it found that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice", and that the problem of discrimination against older workers was indeed "grave". 29 U.S.C. §621(a). The principles of the nation's anti-discrimination laws have their roots in the constitutional values embodied in the Fourteenth Amendment. Having concluded that statutes such as the ADEA and Title VII were indeed vital to the interest and conscience of the nation, Congress could not have intended to tacitly engraft into those landmark enactments an exception which did not exist in other then existing federal statutes regulating employer-employee relations.

A number of these non-civil rights cases, including *ABF Freight System*, turned in part on the fact that the interpretation of the statute involved was advanced by the agency charged by Congress with primary responsibility for implementing that law. But that is true here as well. The EEOC, which is responsible for the enforcement of the ADEA and Title VII, has expressly rejected the per se rule applied by the Sixth Circuit in this case. The Commission has concluded that the proper role of after-acquired information is only to limit in certain respects, not to bar entirely, relief for intentional discrimination:

[I]f the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be

shielded from an order requiring it to reinstate the complainant or to pay the portion of back pay accruing *after* the date that the legitimate basis for the adverse action was discovered, and the portion of compensatory damages . . . that would cover losses arising *after* that date . . . [I]f the employer's *sole* motivation was discriminatory and it acted with "malice or with reckless indifference" to the victim's rights, proof of an after-the-fact justification would not shield an employer from an order requiring it to pay punitive damages.

Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, EEOC Compl. Man. (BNA) 405:6926-27 (first two emphases added, third emphasis in original). Respondents candidly acknowledge that such EEOC "policy guidance statements are relevant" and "instructive here". (Br. in Opp., 21, 22 n. 28).

III. AFTER-ACQUIRED INFORMATION THAT MIGHT WARRANT DISMISSAL OF AN EMPLOYEE DOES NOT PRECLUDE A FINDING OF LIABILITY UNDER THE ADEA

The Sixth Circuit's per se rule could be sustained if the effect of after-acquired information were somehow to render lawful acts that otherwise would have violated the ADEA. Clearly, however, such after-acquired information cannot affect the legality *vel non* of events which occurred at a point in time when the employer, by definition, had not yet acquired that knowledge.

The ADEA provides that it is "unlawful for an employer . . . to discharge any individual . . . because of such individual's age". 29 U.S.C. §623(1). The statutory language on its face recognizes no exception to this straightforward prohibition; it forbids an age-based dismissal of "any" individual, not "any individual except one who has copied

documents without authorization" or "any individual other than one who has made a false statement on a job application." Far from making such narrow distinctions, the ADEA "broadly prohibits" discrimination on the basis of age. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985).

If the existence of an as yet unknown legitimate basis for dismissing an individual were sufficient by itself to render discrimination lawful, imperfect employees would fall completely outside the protections of the ADEA or Title VII. One lower court judge has indeed suggested that statutes such as the ADEA simply do not apply to such dismissable employees¹⁹. Pursuant to this view, discrimination against such workers is legal under the ADEA, and the after acquisition of relevant information simply reveals that the workers never enjoyed any legal protection in the first place.²⁰ But Congress in both the ADEA²¹ and Title VII²² spelled out quite specifically those

¹⁹*Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1187-89 (Godbold, J., dissenting.)

²⁰In at least one instance a court applying the per se rule has invoked it to dismiss employment discrimination claims by an individual who was still employed by the defendant. In such a situation the employer would literally be free to discriminate against the employee with complete impunity. *Russell v. Microdyne Corp.*, 830 F.Supp. 305, 308 (E.D.Va. 1993) ("regardless of the reasons for Russell's continued employment by Microdyne, . . . there is no principled reason for applying the after-acquired evidence doctrine differently for a current employee than for a former employee.") (claim of sexual harassment).

²¹The ADEA does not apply to individuals employed by employers with fewer than twenty employees, 29 U.S.C. §630(b), to state employees who are elected or hold certain policy-making positions, 29 U.S.C. §630(f), or to persons over the age of 70. 29 U.S.C. §631.

employees to whom it wished to deny coverage. None of those express statutory exceptions is applicable to petitioner. The courts are not free to create additional exceptions to the otherwise comprehensive protections of the law.²³ Petitioner is indeed covered by the protections of the ADEA, and the discrimination alleged here was illegal regardless of what after-acquired information there may be.

In a disparate treatment case, the legality of an adverse employment action turns on the motive of the employer at the time the actions occurred.²⁴ This Court has recognized that the contemporaneous existence of a legitimate motive may render lawful an action that was also taken in part for an unlawful reason. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City School Bd. v. Doyle*, 429 U.S. 274 (1977). But these cases make clear that to effect the legality vel non of an action, that legitimate reason must be one which the employer actually had in mind at the "particular time" when the disputed action took place. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983).

The critical inquiry, the one commanded by the [prohibition against intentional discrimination], is whether [age] was a factor in the employment

²²As originally enacted, Title VII did not apply to individuals employed by firms with fewer than 25 (now 15) workers, the United States, a state or political subdivision, an Indian Tribe, or certain bona fide private organizations, or to certain employees of religious organizations.

²³*Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 323 (D.N.J. 1993) ("There is nothing in the statute itself to support a requirement that the job had been acquired honestly.")

²⁴*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (legality of the action turns on "the true reason for the employment decision").

decision *at the moment it was made*. . . . An employer may not, in other words, prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time of the decision*.

Price Waterhouse v. Hopkins, 490 U.S. at 240, 252 (first emphasis in original; second emphasis added). The employer can avoid a finding of liability only by proving "the same decision would have been reached" even in the absence of any unlawful motive. *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 285 (1977).²⁵

In light of *Price Waterhouse* and *Mt. Healthy*, the defect of the Sixth Circuit's per se rule is readily apparent. After-acquired information cannot overcome the legal consequences of the existence of a discriminatory motive precisely because that information is "after-acquired". As the Eleventh Circuit has correctly pointed out, the fatal flaw in the per se rule is that it "ignore[s] the time lapse between the unlawful act and the discovery of a legitimate motive." *Wallace v. Dunn*, 968 F. 2d at 1181.²⁶ *Mt. Healthy's* requirement that the employer prove that it would have made the "same decision" on the proffered legitimate basis

²⁵*Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n. 10 ("employment decision the same"), 242 ("same decision"), 250 ("same decision"), 258 ("same decision") (1989); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 ("would have acted in the same manner") (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416 ("same decision") (1979); *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 270 n. 21 ("same decision") (1977).

²⁶In rejecting the per se rule, the EEOC reasoned, "If an employer terminates an individual on the basis of a discriminatory motive, but discovers afterwards a legitimate basis for the termination, then the legitimate reason was not a motive for the action." *Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, EEOC Compl. Man. (BNA) 405:6915, 405:6926.

surely means that the employer must show that both the substance and the date of its decision would have been the identical. An employer could not defend the race-based dismissal of a worker in 1980 by asserting that it would in any event have dismissed that worker in 1990 when it closed the plant at which he or she worked. A decision to fire an employee in October 1990, the date on which petitioner was actually dismissed, is simply not the same thing as a decision to fire that employee in December 1991, the date on which respondent first invoked the after-acquired information at issue in this case.²⁷

The per se rule is premised on the view that the critical inquiry under *Mt. Healthy* is not what the employer would have done "but for" the discriminatory motive, but what the employer would have done "had all the facts been known."²⁸ Courts applying the per se rule thus hold that it is irrelevant *why* the employer was unaware at the time of the adverse action of the later acquired information.²⁹ This standard would lead to nonsensical results. On this interpretation of *Mt. Healthy*, an employer could avoid liability in a hiring case by showing that, at the time it rejected a qualified black applicant on account of race, there was a better qualified white available for the position, even though the white had never applied for the job and the

²⁷Petitioner also alleges that respondent harassed her and paid her less because of her age. Respondent does not of course contend that petitioner's actions regarding the disputed documents would have prompted the employer to either harass or underpay her.

²⁸*Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1188 (11th Cir. 1992) (Godbold, J., dissenting).

²⁹*Van Deursen v. United States Tobacco Sales Co.*, 839 F. Supp. 760, 764 (D.Colo. 1993); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247, 1252-53 (D. Utah 1993); *Washington v. Lake County, Illinois*, 762 F. Supp. 199, 202 (N.D.Ill. 1991); *George v. Meyers*, 1992 WL 97777, *1 (D. Kan. 1992).

employer only learned of his or her existence long after the black applicant had been rejected. The Eleventh Circuit, which does not follow the per se rule, has correctly rejected that defense.³⁰ In changing economic times, employers often make the mistake of maintaining a large workforce when, had all the economic facts been known, they would have laid off workers. Yet it is inconceivable that an employer could avoid liability under the ADEA or Title VII by proving that it would have fired the plaintiff before the statutory violation occurred, where the basis of that demonstration was after-acquired information regarding the previously secret minutes of the Federal Reserve Board Open Markets Committee, or about a competitor's new product.

If, under the per se rule, after-acquired information is deemed to relate back to the point in time when a disputed employment action occurred, surely the same principle would have to apply where it operates to the advantage of the aggrieved employee. Yet such a retroactive imputation of new information would have a revolutionary impact. Under current law an employer can at times invoke a lack of information as part of its defense in an employment discrimination action. Thus an employer which hired a less qualified man over a better qualified woman is not liable under Title VII if when it made that decision it merely misunderstood the facts.³¹ Similarly, an employer is not liable for liquidated damages under the ADEA if at the time of the violation it believed in good faith that age was a bona fide occupational qualification for the position at issue. If, however, after-acquired information were generally

³⁰*Eastland v. Tennessee Valley Authority*, 704 F. 2d 613, 626 (11th Cir. 1983); *EEOC v. Alton Packaging*, 901 F. 2d 901, 925 (11th Cir. 1990).

³¹*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

deemed to relate back to the date of the alleged violation, it would render illegal otherwise lawful conduct, and render willful some violations which at the time they occurred were non-willful.

The lower courts adopting the per se rule appear to have done so out of a concern about the problem of employee misconduct and resume fraud. Congress has wisely chosen, however, not to require or authorize the federal courts to engage in a general policing of the American workplace. Rather, Congress has carefully delineated those employment problems which are to be addressed in federal courts, leaving all other issues to state courts or less formal methods of resolution. The ADEA and Title VII deal with two problems Congress concluded should be dealt with in federal court. This Court observed in *St. Mary's Honor Center v. Hicks*, 509 U.S.---, 125 L. Ed. 2d at 407 (1993), that "Title VII is not a cause of action for perjury." 125 L. Ed. 2d at 425. Neither is the ADEA a Truth-In-Resumes Act, or a general code of employee conduct.

Hicks held that federal courts in Title VII or ADEA cases are to restrict themselves to determining whether acts of intentional discrimination had occurred. If an employer were to proffer false testimony, *Hicks* held, that would not warrant entry in favor of the plaintiff of a "judgment-for-lying". 125 L. Ed. 2d at 425. Under the per se rule, however, "judgments-for-lying" are regularly entered in favor of defendants, where, for example, a plaintiff had lied on a resume. That is precisely the judgement which the Sixth Circuit directed be entered in *Milligan-Jensen v. Michigan Technological University*, 975 F. 2d 302 (6th Cir. 1992). Similarly, this Court insisted in *Hicks* that judgment for the plaintiff could not be based on the fact that the facility director, John Powell, had engaged in a vendetta against Melvin Hicks for personal rather than racial reasons. But under the per se rule, the defendant in *Hicks* would have been entitled to judgment, despite acts otherwise unlawful

under Title VII, if Mr. Hicks had engaged in such a personal vendetta against Powell. We suggest that neither form of misconduct should be relevant to the question of liability under federal anti-discrimination laws.

The per se rule commits the federal courts to a task even further removed from the enforcement of employment discrimination law than merely punishing falsehoods. The district court in the instant case held that federal employment discrimination claims are to be dismissed for "severe" "misconduct", although not for "minor or trivial" infractions. (Pet. App. 16a, 17a).³² The implementation of such a distinction would require the federal courts to construct a federal common law of employee conduct, selecting from the limitless variety of activities engaged in by workers those actions to be labeled misconduct, and then deciding which of these were to be rated "severe" and which "minor." Federal judges, however, have neither the capacity nor the congressional mandate to establish such an employee rating system. This Court in *Still* rejected a per se rule barring FELA claims by workers who had engaged in serious fraud precisely because it found that lower courts which had tried to apply such a rule had "been forced to struggle with the baffling problem of how much and what kinds of fraud are sufficiently abhorrent." 368 U.S. at 42.³³

³² See also R. Br. Opp. 10, 11 ("the doctrine" applies to "serious misconduct" but not "minor infractions").

³³ Respondent urges this Court to decide that a secretary who copies ten pages of documents and takes them home, showing them to no one but her husband, is guilty of "severe" rather than "minor" misconduct (R.Br.Op. 10-11). That is simply the wrong question. The threshold issue in an after-acquired information case is not a question of law for the court regarding whether an infraction is to be rated as "severe", but a question of fact--to be decided in an ADEA case by the jury--as to whether the particular employer would actually have dismissed the plaintiff on that basis.

To the extent that employers may have been wronged by present or former employees, "we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d at 407; see *ABF Freight System v. NLRB*, 510 U.S. --, 127 L. Ed. 2d 152, 160 (1994). If the respondent has been injured by petitioner, it can presumably bring an appropriate action in state court. Such state court proceedings are a far more appropriate form of redress for aggrieved employers, since state courts can award the precise level of relief warranted by the circumstances. The only form of redress for employee misconduct available from a federal court entertaining an employment discrimination action is dismissal of that federal claim, the value of which may greatly exceed, or be far less than, whatever harm may have been suffered by the employer.³⁴ In some instances criminal or other forms of disciplinary proceedings might be appropriate. In several after-acquired information cases the plaintiffs had in fact already been sanctioned in that manner³⁵. No federal purpose is served by imposing the additional sanction of dismissal of pending employment discrimination claims.

³⁴The court of appeals below expressed concern about a hypothetical case in which an employment discrimination victim stole "money from her employer for support of herself." Pet. App. 9a n.8. In *Johnson v. Honeywell Information Systems, Inc.*, 955 F. 2d 409, 415 (6th Cir. 1992), the Sixth Circuit hypothesized a situation in which the civil rights plaintiff was a non-physician who had been working under false pretenses as a company doctor. The important thing about these somewhat far fetched hypotheticals is that if they ever in fact occurred, the employees could and almost certainly would be subject to criminal prosecution.

³⁵Such sanctions had in fact been imposed on the plaintiffs in *Omar v. Sea-Land Service, Inc.*, 813 F. 2d 986, 988 (9th Cir. 1987)(seaman's papers revoked by the Coast Guard); *Moyland v. Maries County*, 792 F. 2d 746, 748 (8th Cir. 1986)(plaintiff charged with a misdemeanor).

This Court admonished in *Hicks* that awarding judgment to an employment discrimination plaintiff because a defense witness lied would be a "strangely selective" sanction that was far from "fair and even-handed." *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d at 425. The same is true of the per se rule applied below. An employer is free to perpetrate on an employee violations of tort, contract, or criminal law principles without any consequence under the ADEA or Title VII, so long as no invidious motive is involved, while the employee's rights under those laws may be forfeited for similar infractions. Even where the employer's misconduct is related to an intentionally discriminatory scheme, the effect of the per se rule is necessarily to punish the employee and exonerate the employer.³⁶ In the sometimes rough and tumble world of employer-employee relations, the effect of the per se rule is to "license [the employer] to fight freestyle, while requiring the [employee] to follow Marquis of Queensbury Rules." *R.A.V. v. St. Paul*, 505 U.S. ---, 120 L. Ed. 2d 305, 323.

IV. AFTER-ACQUIRED INFORMATION THAT MIGHT WARRANT DISMISSAL OF AN EMPLOYEE MAY LIMIT, BUT IS NOT A COMPLETE BAR TO, RELIEF UNDER THE ADEA

The decision of the Sixth Circuit below asserts, albeit with little explanation, that after-acquired information which

³⁶See *Bonger v. American Water Works*, 789 F. Supp. 1102, 1106-07 n.5 (D. Colo. 1992)(in dismissing Title VII claim because plaintiff had made false statement in her resume, court deems irrelevant fact that company official made false statement about his own work experience at deposition). In the not uncommon situation in which an employer has a written policy against discrimination, the plaintiff's allegation of discrimination is necessarily also a claim that one or more supervisory officials violated the employer's own rules.

would have led to a plaintiff's dismissal "is a complete bar to any recovery." (Pet. App. 6a).

It is particularly clear, however, that after-acquired information should not be a bar to recovery in a claim under the ADEA. Section 4(b) of the ADEA, 29 U.S.C. §626(b), states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in sections 211(b), 216 . . . and 217 of this title." The referenced sections are the enforcement provisions of the Fair Labor Standards Act. 29 U.S.C. §201, et seq. As we set out *supra*, the Fair Labor Standards Act was authoritatively construed in 1962--five years prior to the 1967 enactment of the ADEA--not to contain any per se bar based on after-acquired information, an interpretation of the FLSA sought and supported by the Wage and Hour Division of the Department of Labor. *Goldberg v. Bama Manufacturing Corp.*, 302 F. 2d 152 (5th Cir. 1962).

Read in conjunction with the language of section 4(b), *Goldberg* is dispositive of the after-acquired information issue under the ADEA. This Court explained in *Lorrillard v. Pons*, 434 U.S. 575 (1978):

[W]e find a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the "powers, remedies, and procedures" of the FLSA Congress is presumed to be aware of an administrative or judicial interpretation of a statute [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA

provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

434 U.S. at 581 (Emphasis omitted). Only last year this Court reiterated the decisive importance of pre-1967 interpretations of the FLSA in construing the ADEA, *Hazen Paper Co. v. Biggins*, 507 U.S. ---, 123 L. Ed. 2d 338, 349 (1993), as it had in *Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 126 (1985). In this context the decision in *Goldberg* is sufficient to compel rejection of the Sixth Circuit's interpretation of the ADEA.

Even in the absence of *Goldberg*, the well established remedial principles applicable to any employment discrimination claim would require rejection of the Sixth Circuit's per se rule. The remedial issues in all such cases are guided by this Court's seminal decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Explaining the remedial provisions of Title VII, the Court laid down a standard equally applicable to all civil rights statutes:

[T]hat Act is intended to make the victims of unlawful discrimination whole, and that . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

422 U.S. at 421. The Court has reiterated that standard on a number of occasions. *United States v. Burke*, 504 U.S. ---, 119 L. Ed. 2d 34, 46 (1992)(quoting *Albemarle*); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982)(quoting *Albemarle*); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (quoting *Albemarle*), 769 (courts are to "restor[e] the economic status quo that would have obtained but for the company's wrongful [act]")(1976).

Under the per se rule applied by the Sixth Circuit, however, the victims of discrimination in an after-acquired information case are *never* placed in the "position where they would have been were it not for the unlawful discrimination." The relief accorded under the per se rule is not limited or inadequate, it is completely non-existent. Far from being restored to the position they would have been in had the violation of the ADEA not occurred, under the Sixth Circuit rule the victims of the unlawful discrimination are left to suffer all the injuries inflicted by a violation of federal law, as if the ADEA itself had never been enacted. The Sixth Circuit decision in the instant case denies petitioner four distinct types of relief necessary to restore her to the circumstances that would have existed but for the alleged discriminatory acts.

First, under the Sixth Circuit rule petitioner is denied damages for intentional harassment on the basis of age, in this case harassment inflicted on her for the purpose of coercing her resignation. Decisions applying the Sixth Circuit's per se rule have repeatedly dismissed without relief claims of harassment on the basis of race or gender, including sexual harassment.³⁷ This Court noted in *Harris*

³⁷*Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D.Va. 1993)(dismissing sexual harassment claim); *Baab v. AMR Services Corp.*, 811 F. Supp. 1246 (N.D.Ohio 1993)(dismissing sexual harassment claim); *Washington v. Lake County, Illinois*, 762 F. Supp. 199 (N.D.Ill. 1991)(dismissing racial harassment claim); *Churchman v. Pinkerton's Inc.*, 756 F. Supp. 515 (D. Kan. 1991)(dismissing sexual harassment claim); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991 (D. Kan. 1989)(dismissing claims of racial and sexual harassment); *Benson v. Qualex Corp.*, 58 FEP Cas. 743 (E.D.Mich. 1992)(dismissing racial harassment claim).

Other decisions have refused to allow employers to invoke after-acquired information to block relief in sexual or other harassment cases. *Wallace v. Dunn Construction Co.*, 968 F.2d 1174, 1182 (11th Cir. 1992)(sexual harassment); *Bazzi v. Western and Southern Life Insurance Co.*, 808 F. Supp. 1306 (E.D.Mich.

v. Forklift Systems, Inc., 510 U.S. ___, 126 L. Ed. 2d 295, 302 (1993), the wide variety of injuries that can be occasioned by such harassment. Unlike the ADEA, which from the beginning authorized the granting of "legal . . . relief", 29 U.S.C. §626(b), Title VII as originally enacted provided only for equitable remedies. When Title VII was amended to authorize damage awards, Congress was particularly concerned about the need for such awards in harassment cases, noting that harassment could cause "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. §1981a(b)(3). In especially egregious cases, invidious harassment can "destroy completely the emotional and psychological stability of . . . workers." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986).

None of these are injuries that would have been sustained had respondent merely dismissed petitioner for the alleged misconduct, whether that dismissal had occurred at the time of the actual discharge, October 1989, or when the after-acquired information was first invoked, December 1990. Respondent contends only that it would have discharged petitioner on the basis of that information; respondent does not assert that, in some malicious fit of pique, it would have subjected petitioner to a protracted period of harassment before firing her. Thus the after-acquired evidence on which respondent relies does not affect the undeniable fact that only an award of damages can restore petitioner to the position she would have been in had the harassment not occurred.

Second, under the decision below petitioner is denied back pay for the period when respondent paid her a lesser

1992)(national origin harassment).

wage on account of her age.³⁸ This claim relates to wages petitioner earned during a period of more than a year prior to her dismissal. Regardless of whether respondent might have been justified in dismissing petitioner at some point in this period, respondent did not do so. Petitioner was employed by respondent throughout those months, and respondent does not assert that the after-acquired evidence gave it any right to refuse to pay her for work actually performed. The ADEA provides that the amount of compensation which petitioner would otherwise have been paid for her work could not be reduced because of her age. If, as petitioner contends, she was paid less in 1989-90 because of her age, she was entitled to that unlawfully withheld wage when she earned it, and she remained entitled to it on the day she was actually fired, even if that dismissal had been for lawful reasons. The after-acquired information in this case does not affect the fact that only an award of back pay will restore petitioner to the position she would have occupied had the wage discrimination not occurred.

Third, under the Sixth Circuit decision petitioner is improperly denied any back pay whatever for her unlawful discharge. We acknowledge that, under *Albemarle*, the after-acquired evidence may be relevant to the *amount* of back pay for such an unlawful dismissal. Back pay for any discriminatory discharge necessarily terminates at that point

³⁸Petitioner contends she was denied equal pay in two ways, by being denied a raise which would have been awarded but for her age, and by being denied on that basis compensatory time to which she otherwise would have been entitled.

In addition to the instant case, the per se rule was used to bar wage discrimination claims in *Miller v. Beneficial Management Corp.*, 844 F. Supp. 990 (D.N.J. 1993) and *Rich v. Westland Printers*, 62 FEP Cas. 379 (D. Md. 1993). Other decisions have concluded that after-acquired information should be treated as legally irrelevant to such equal pay claims. See, e.g., *Boyd v. Rubbermaid Commercial Products*, 62 FEP Cas. 1228 (W.D.Va. 1992).

in time at which the victim would have lost his or her job for non-discriminatory reasons. For example, having been dismissed in October, 1990, petitioner's right to back pay would have ended on June 30, 1991, if on that date respondent had closed its doors and fired its entire staff; in such a situation an award of back pay from October 1990 through June 1991 would be sufficient to restore petitioner to the position she would have occupied but for the discriminatory dismissal. This application of the *Albemarle* "but for" rule does not, however, mean that the mere existence of after-acquired information automatically wipes out all back pay claims in unlawful discharge cases. "But for" the discriminatory discharge, an employee would have remained on the job from the date of the unlawful dismissal until the date on which the employer learned the relevant information and dismissed the plaintiff.³⁹ Thus, as the Eleventh Circuit urged in *Wallace v. Dunn Construction Co.*, the back pay period in a wrongful discharge case only cuts off at the point in time at which, but for the discrimination, the employer would have discovered the relevant information and would have dismissed the employee. 968 F. 2d at 1182.

Of course, an employer could attempt to show that it would have discovered the critical information only a matter of days after a plaintiff was unlawfully dismissed, thus reducing its back pay exposure to a nominal amount.⁴⁰ Although, in the instant case, respondent only learned

³⁹If [the plaintiff] is not compensated for the losses suffered between the time he was illegally fired and the time he would have been fired on account of the discovery of relevant facts, he is not in the same position he would have been in but for a wrong committed against him, and the purpose of the protective legislation is entirely lost." *Welch v. Liberty Machine Works, Inc.*, 1994 WL 169682 at *4 (8th Cir. 1994)(Arnold, J., dissenting).

⁴⁰*Proulx v. Citibank, N.A.*, 681 F. Supp. 199, 203 (S.D.N.Y. 1988).

about the disputed documents in December, 1991, it might conceivably be able to demonstrate that the problem would have come to light much sooner had petitioner not been dismissed in October, 1990. But, as is true in framing any remedy under *Albemarle*, the dispositive question is when the information would have come to light "but for" the unlawful discrimination.

In some circumstances even reducing a back pay award on the basis of after-acquired evidence would be inconsistent with the principles of *Albemarle*. As the circumstances of this case illustrate, actions taken by an employer in violation of federal anti-discrimination law may understandably prompt a response by the intended victim of that statutory violation, including steps to protect his or her legal rights.⁴¹ Where an employer in turn seizes on that response as providing a justification for dismissal, the entire train of events is one that would not have occurred "but for" the original statutory violation. In at least some circumstances it would be inappropriate to reduce the remedy accorded to a discrimination victim merely because of his or her response to that violation.

The courts below mistakenly thought it irrelevant as a matter of law whether the copying of the documents at issue in this case was a response to respondent's violation of the ADEA. (Pet. App. 8a, 9a, 17a). The court of appeals believed that it would be appropriate to consider after-acquired information that an employee had embezzled large sums of money in response to a statutory violation. (Pet. App. 9a n. 8) On the other hand, an employer could not conceivably dismiss an employee, on the basis of after-

⁴¹*O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466, 1467 (D. Ariz. 1992)(plaintiff copied document showing alteration of his ranking to justify discriminatory layoff); *Boyd v. Rubbermaid Commercial Products, Inc.*, 62 FEP Cas. 1228 (W.D. Va. 1992)(plaintiff copied document revealing salary discrimination).

acquired evidence or otherwise, because, in response to a sexual assault by her supervisor, she had denounced him in coarse language.⁴² Where the instant case falls between those is one of the issues that must be addressed on remand.

Petitioner also sought in her complaint an award of liquidated damages for an allegedly willful violation of the ADEA. Under the ADEA a plaintiff is entitled to liquidated damages equal to the amount of any damages awarded for such a violation shown to be willful. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Because such liquidated damages are not intended to make a plaintiff whole for harm occasioned by a violation of the ADEA, the *Albemarle* analysis set out above is not the appropriate one. Nonetheless, after-acquired evidence cannot provide a basis for denying liquidated damages where they are otherwise appropriate under the ADEA.

The plain language of the ADEA and FLSA unequivocally directs the courts to make such an award if two circumstances are met: (1) a plaintiff has been awarded damages under the ADEA and (2) the underlying violation was a "willful" one. Section 216(b) of the FLSA, which the ADEA expressly incorporates by reference, states unequivocally, "Any employer who violates [the law] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages." 29 U.S.C. §216(b) (Emphasis added). Although a portion of the Portal-to-Portal Pay Act accords courts some latitude to deny liquidated damages in FLSA cases, that provision of the Portal-to-Portal Pay Act is specifically inapplicable to ADEA cases. See *Lorillard v. Pons*, 434 U.S. 575, 581 n. 8 (1978). The legislative history of the ADEA indicates that Congress included the liquidated damages provision in order to punish

⁴²*EEOC v. FLC Brothers Rebel, Inc.*, 663 F. Supp. 864, 867 (W.D.Va. 1987).

willful violators of the law, and to operate as "an effective deterrent to willful violations." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985). The finding of willfulness that mandates an award of liquidated damages turns solely on the state of mind of the employer at the time of the underlying violation. Willfulness is present, and liquidated damages are thus required, if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126. Such a finding of willfulness, like a finding of unlawful discrimination under *Price Waterhouse*, is thus not affected by what the employer may have learned at a point in time subsequent to the violation.

The Sixth Circuit's total denial of all monetary relief in after-acquired information cases is inconsistent with *Albemarle's* explanation that monetary awards provide an essential incentive for compliance with the law.

If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices"

Albemarle Paper Co., v. Moody, 422 U.S. at 417-18. Under the Sixth Circuit rule, however, instead of fearing the "reasonably certain prospect of a [monetary] award", employers are reassured by the prospect that an after-acquired information defense may be found for any illegality, a prospect which one lawyer giddily described as "akin to winning the lottery."⁴³ Rather than re-examining whether

⁴³*Lawyers Weekly USA*, June 21, 1993, p. 1, col. 1; see also *id.* ("Some defense attorneys are now routinely 'digging up dirt' on plaintiffs and using it to obtain summary judgment").

their practices are in compliance with federal law, employers are now being admonished to re-evaluate whether their practices maximize the likelihood that they will be able to invoke after-acquired evidence to escape responsibility for violations of federal law⁴⁴, and are being urged to comb through old resumes looking for misstatements.⁴⁵ Rather than increasing employment opportunities, the Sixth Circuit per se rule has prompted employers' counsel to urge that

⁴⁴G. Mesritz, "After-Acquired' Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims", 18 *Employee Relations L.J.* 215, 215 ("Employers . . . should maximize the probability that 'after-acquired' evidence is available as a defense by revising employment applications to elicit even more specific information"), 222("[A]pplications should be revised to maximize the availability of the 'after-acquired' evidence defense. Questions about education and employment should require degrees obtained, dates of employment, reason for leaving, and addresses of all schools and previous employers. . . . Additionally, applicants should be required to identify all positions held with each previous employer and to describe duties and responsibilities for each position."), 222(employer written rule that workers may be fired for false statements in job applications "should *not* refer to 'intentional' or 'material' misrepresentations. . . [E]mployers should not limit their right to discharge only for 'material' misrepresentations.")(1992). The article notes that the author is "one of the attorneys who defended the [*Johnson v.*] *Honeywell* litigation." *Id.* at 215.

⁴⁵*Id.* at 215 ("Management attorneys should respond to [the Sixth Circuit decision in *Johnson*] by routinely searching for pre-employment misrepresentations as a potential defense . . ."), 224 ("Investigating for 'after-acquired' evidence should include subpoenas to all educational institutions and previous employers for all documents concerning plaintiff. Physicians and mental health care professionals also should be subpoenaed to determine whether plaintiff's representations . . . were truthful. Courts located where plaintiff has resided should be contacted Additionally, the employer should conduct an internal investigation for misconduct that, although unknown at the time of discharge, may support an 'after-acquired' evidence defense.")

more employees be ruthlessly dismissed, even for relatively minor infractions, in order to provide a basis for later arguing that civil rights plaintiffs too would have been discharged.⁴⁶

The only passage in the decision below intimating any reason *why* after-acquired information should be such a complete bar to relief is a puzzling remark that such information, although it "could not have been the actual cause of the employee's discharge, . . . was relevant and determinative as to the employee's claim of injury" (Pet. App. 5a). This appears to echo a briefer and even more cryptic assertion in *Milligan-Jensen* that the plaintiff there had suffered "no legal damage." 975 F. 2d at 305. These epigrammatic arguments are difficult, not only to understand, but even to reconcile, since *Milligan-Jensen* asserts, to justify its statement that there is no "legal damage", that "the problem [is] one of causation", *id.* at 304, which is precisely the explanation which the Sixth Circuit in the instant case disavowed. Whatever these opaque passages may mean, if petitioner can prove the allegations of her complaint, that will demonstrate, as a matter of common sense, ordinary English, and law, that petitioner was in fact injured, and that the cause of that injury was harassment, unequal pay and ultimately discharge on the basis of her age. If petitioner can establish these facts, she would unquestionably be entitled to relief.

In sum, after-acquired information which would have prompted an employer to dismiss a plaintiff may limit, but will not bar entirely, relief in an employment discrimination

⁴⁶*Id.* at 223 ("If a misrepresentation is disclosed, the applicant should not be hired, no matter how impressive the applicant is otherwise. . . . Misrepresentations discovered after an employee is hired should result in immediate discharge. Uniform application of the rule prohibiting pre-employment misrepresentations is critical.")(Emphasis in original)

case. Reinstatement and front pay will, at least ordinarily, be unavailable. Back pay in a discharge case will run until the point in time at which the employer can establish it would have acquired the information and would have dismissed the plaintiff.⁴⁷ Compensatory damages for harassment, liquidated damages for willful violations, and punitive damages where otherwise appropriate will not be affected even if an employer succeeds in establishing an after-acquired information defense.

V. THE DECISIONS BELOW MUST BE REVERSED

In light of the foregoing analysis, the decision of the courts below dismissing the complaint must for several distinct reasons be overturned.

First, the dismissed complaint sought compensatory damages for harassment, back pay for a denial of back pay, and liquidated damages for willful violations of the ADEA. None of these remedies should be affected by the proffered after-acquired information.

Second, insofar as the complaint seeks back pay for unlawful discharge, the after-acquired information defense, if successful, might reduce, even substantially, that award, but could not eliminate it entirely. If, for example, respondent can prove that it would have acquired the relevant information and would have dismissed petitioner shortly after the actual October 1990 discharge date, it will reduce this aspect of its back pay liability to a relatively nominal amount. At this stage, however, respondent has not adduced any evidence, or even made any allegation, regarding when it would have acquired that information "but for" the alleged statutory violation.

⁴⁷If that date cannot be established, back pay will, unless other limiting circumstances are present, run until the date of judgment.

Third, in evaluating the after-acquired evidence defense, the district court misapprehended which party bears the burden of proof on that issue. A defendant that seeks to reduce its liability for unlawful discrimination by asserting that it would have dismissed a plaintiff on the basis of some legitimate reason, after-acquired or not, bears the burden of proving that assertion. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n. 11, 250, 252, 258 (1989); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983); *Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977); *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 270 n.21 (1977); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). The district court thus erred when it held that dismissal of the complaint was required because petitioner had "brought forth no evidence tending to prove that the Banner would have continued her employment had it learned of her misconduct prior to her termination." (Pet. App. 17a).

It is equally clear that, regardless of which party bore the burden of proof, the question of whether respondent would have dismissed petitioner on the basis of the after-acquired information is one which in this case, at least, cannot be resolved on summary judgment. Respondent candidly acknowledges that there is a dispute as to whether petitioner's asserted misconduct was "serious enough to warrant termination." (R.Br. Op. 3). More fundamentally, here, as will often be the case, the dispute regarding whether the petitioner would have been dismissed is inextricably intertwined with the merits of petitioner's claims. The after-acquired information defense raised by respondent is similar to the argument advanced by the employer in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that it had refused to hire Green because of his involvement in a stall-in that obstructed access to the company plant. This Court held that in assessing that claim, the finder of fact should consider the defendant's "general policy and practice with respect to minority employment." 411 U.S. at 804-05.

Similarly, in the instant case a demonstration that respondent had discriminated against petitioner on the basis of age through harassment, denial of raises and dismissal would be persuasive evidence that any hypothetical after-acquired information dismissal would also have been age based. The particular company officials on whose affidavits respondent relies in its after-acquired information defense are the very same individuals whom petitioner alleges orchestrated a year long intentional violation of the ADEA.⁴⁸ If the finder of fact rejects testimony by those officials regarding that discrimination, that conclusion will obviously affect its assessment of the credibility of their testimony regarding the after-acquired information defense. *Price Waterhouse v. Hopkins*, 490 U.S. at 252 n. 14.

In support of its contention that it would have fired petitioner based on the after-acquired information, respondent submitted four similarly worded conclusory affidavits to that effect from company officials. (J. App. 35a-43a). The Sixth Circuit apparently regarded those affidavits as sufficient to meet respondent's burden of proof on that issue. In this regard as well the court of appeals departed from the holdings of this Court.

In *Price Waterhouse* this Court insisted that an employer could only meet its burden of proof by adducing "some objective evidence as to its probable decision in the absence of an impermissible motive." 490 U.S. at 252. The Court rejected the suggestion that an employer might do so merely by offering conclusory testimony that the employee would have been dismissed even in the absence of the unlawful motive. *Compare* id. at 252 n. 14 *with* id. at 261 (White, J., concurring). The EEOC has expressly endorsed

⁴⁸ Stoneking, Simpkins and McMillan were all named in the complaint as involved in the conspiracy. J. App. 7a-9a.

the *Price Waterhouse* requirement of objective evidence.⁴⁹ The employer could meet that burden, for example, by adducing proof that it had an "absolute policy"⁵⁰ of dismissing comparable offenders. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

The reason for this requirement of objective evidence is particularly apparent in an after-acquired information case. Assessment of such a defense requires a court to determine what would have occurred if the employer had taken no unlawful action, had had no impermissible motive, and had known facts which it did not know. Whether the employer would have fired the plaintiff on the basis of that after-acquired information is thus not a question about the state of mind of any actual personnel official or other individual, but a hypothetical construct arrived at by considering the actions of the plaintiff and the standards in fact applied by the employer at the relevant point in time. The employer's actual record in disciplining, or not disciplining, other employees⁵¹ will often be the "truer

⁴⁹*Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, EEOC Compl. Man. (BNA) 405:6915, 405:6925 ("the respondent must offer objective evidence [A] mere assertion of a legitimate motive, without evidence . . . would not be sufficient.")(quoting *Price Waterhouse*).

⁵⁰*Id.* at 405:6926.

⁵¹*Welch v. Liberty Machine Works, Inc.*, 1994 WL 169682 *3 (8th Cir. 1994) ("Allowing Liberty . . . to establish a purported policy of this nature solely on the contents of [a company official's] affidavit seems to us to be contrary to the dictates of *Mt. Healthy*. . . . [W]e believe that the employer bears a substantial burden of establishing that the policy pre-dated the hiring and the firing of the employee in question and that [its written] policy constitutes more than mere . . . boilerplate. Liberty presented no other evidence of its policies. By itself, [the official's] affidavit is a self-serving document and does not establish the material fact that Liberty would not have hired Welch

[standard] than the dead words of written text", *Monell v. Department of Human Services*, 436 U.S. 658, 691 n. 56 (1978), particularly because in virtually all after-acquired information cases the relevant written standards stated only that an employee "could" be dismissed under the circumstances at issue.⁵² Testimony or evidence regarding such actual practices would obviously be relevant and could in appropriate circumstances satisfy an employer's burden of proof⁵³, although the credibility and probativeness of the evidence would have to be determined at trial by the finder of fact.

but for the misrepresentation. As the movant for summary judgment, Liberty bore the significant burden of establishing that it had a settled policy of never hiring individuals similarly situated to Welch."); *Leahey v. Federal Express Corp.*, 685 F. Supp. 127, 128 (E.D.Va. 1988)(after-acquired information defense would be too speculative to submit to a jury if not "anchored in evidence concerning defendant's procedures and practices.").

⁵²*Kristufek v. Hussman Food Service Co.*, 985 F. 2d 364, 369 (7th Cir. 1993)("The principal evidence of the company policy appears on the employment application form which warns that 'any misstatement or omissions of material facts . . . may be cause for immediate dismissal.' 'May be' is not 'will be' and is not enough to avoid the proven charge of retaliatory firing"); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 326-27 (D.N.J. 1993)(employer handbook which stated disciplinary action for the misconduct "may include suspension, demotion, or discharge, depending upon the circumstances" insufficient to meet employer's burden of proof; "it does not state that all falsifications will result in dismissal, but merely that falsifications will be considered grounds for dismissal").

⁵³*Redden v. Wal-Mart Stores, Inc.*, 832 F. Supp. 1262, 1266 (N.D.Ind. 1993)(employer demonstrated that a large number of employees had in fact been dismissed for the same misconduct); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247, 1249 (D. Utah 1993)(dismissal of alien employee required by federal law).

But an affidavit or testimony which merely asserts in conclusory terms that an employer would have dismissed the plaintiff is not by itself sufficient to meet that burden. Such testimony obviously provides the finder of fact with no information whatever about the employer's actual practices. Such a bald assertion may reflect, not any consideration of the employer's past practices, but only the witness's personal attitude toward the plaintiff, an attitude all too likely colored by the charge of discrimination or an understandable desire to limit the defendant's liability. A witness who asserts that a plaintiff would have been dismissed, but says nothing about the employer's actual standards, is no more probative than a witness who asserts that a plaintiff would have been dismissed, but does not reveal the nature of the alleged misconduct involved. At best such a conclusion would mean that the witness claimed to have considered the employer's undisclosed past standards and applied them to his or her view of the facts of the controversy, thereby purporting to usurp the factfinding responsibilities of the judge or jury. Testimony or affidavits otherwise insufficient to meet an employer's burden of proof are not strengthened by the addition of rhetorical flourishes, such as assertions that the rule violation was "obvious" or that the asserted dismissal would have been "immediate." (J.App. 35a-43a).

Of course, a factfinder in possession of objective evidence about an employer's actual practices might choose to rely on the opinions of current or former employees, including the plaintiff or company officials, regarding how those standards would have been applied. But absent such objective evidence, ordinarily to be tested at a full due process hearing, regarding the actual standards of a particular employer, a court would often have no way of assessing the significance of conclusory testimony. Federal judges have little expertise in the often widely varying

personnel practices of American employers.⁵⁴ In assessing claims by employers that they would have dismissed a plaintiff for misstatements in a job application, some courts have asserted that "it simply strains credulity to accept that any reasonable management personnel"⁵⁵ would fail to fire workers guilty of that offense, while other courts have insisted that there were "many situations" in which employers would not dismiss workers whom they discovered after the fact to have made such misstatements.⁵⁶ The problem is not simply that one of these assumptions must be incorrect, but that courts have no basis--in the absence of objective evidence regarding a particular employer--for knowing which assumption is the correct one.

In a deposition in the instant case, when counsel for petitioner attempted to ask a company official how he would have responded if various extenuating circumstances had been considered, counsel for respondent repeatedly objected that the question was "hypothetical." (J.App. 68a) That objection illustrates the potential difficulty an employer may

⁵⁴ The dress code at IBM is obviously very different from that at Apple; a federal court would have no way of knowing a priori whether to credit a conclusory affidavit that a software engineer would be fired for failing to wear a suit to work at Compaq.

⁵⁵ *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659 (D. Utah 1990), *aff'd* 12 F. 3d 176 (10th Cir. 1994). The plaintiff in this case had understated her age in her job application out of fear of age discrimination. The employer invoked that misrepresentation a full ten years after she had been hired.

⁵⁶ *Bonger v. American Water Works*, 789 F. Supp. 1102, 1106 (D. Colo. 1992) ("There are many situations . . . in which an employer would not discharge an employee if it subsequently discovered resume fraud, although the employee would not have been hired absent that resume fraud. . . . For example, if the employee had been doing excellent work, if a great deal of resources had been invested in training the individual . . .").

face in meeting its burden of proof. It may at times be impossible to determine whether a plaintiff would have been dismissed on the basis of after-acquired information, due to the complexities of the facts, the vagueness of the employer's standards, disputes about what a plaintiff actually did, or uncertainty regarding the impact of extenuating or aggravating circumstances. Should that be the case, the after-acquired evidence defense would necessarily fail.⁵⁷

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).

In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate.

Price Waterhouse v. Hopkins, 490 U.S. at 246 n. 11. Thus if, on remand, respondent wishes to pursue its after-acquired information defense, it should be required to adduce objective evidence regarding the standards of conduct and levels of discipline which it had actually applied in the past. Should respondent be able to put forward such evidence, it will be up to the finder of fact to determine whether respondent has met its burden of demonstrating by a preponderance of the evidence that it would have dismissed petitioner on the basis of the after-acquired information.

⁵⁷ *Proulx v. Citibank*, 681 F. 2d 199, 203 (S.D.N.Y. 1988) (reduction or denial of back pay based on after-acquired information may not be "based on speculation").

CONCLUSION

To summarize, on remand the merits of petitioner's discrimination claims should first be resolved. Only if discrimination is found will the after-acquired information defense need to be addressed. Should that issue then arise, the burden of proof will be on the respondent, as a proven discriminator, to prove that it would have discharged petitioner had it been aware of that information. If the employer can meet that burden, petitioner will not be entitled to reinstatement or front pay. If the employer can further establish that it would have discovered that information prior to the date of judgment, back pay for the unlawful discharge will cut off on the "but for" discovery date. The after-acquired information defense will not, however, affect petitioner's right to compensatory damages for harassment, to back pay for discrimination in compensation, or to liquidated damages for a willful violation of the ADEA.

For the foregoing reasons, the decision of the Sixth Circuit should be reversed, and the case remanded for a trial on the merits.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

JOINT APPENDIX

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TABLE OF CONTENTS

Item:	Page:
1. Docket Entries	1a
2. Complaint	5a
3. Answer	12a
4. Defendant's Motion for Summary Judgment ..	17a
5. Defendant's Statement of Undisputed Facts in support of Defendant's Motion for Summary Judgment And Exhibits	18a
6. Defendant's Notice of Filing Original Affidavits	34a
Affidavit of Irby C. Simpkins, Jr.	35a
Affidavit of Edward F. Jones	39a
Affidavit of Imogene L. Stoneking	41a
Affidavit of Elise D. McMillan	42a
7. Plaintiff's Statement of Disputed Material Facts	44a
Affidavit of Gene McKennon	46a
Affidavit of Christine McKennon	48a
8. Plaintiff's Notice of Filing Documents	54a
Excerpts from Deposition of Irby C. Simpkins, Jr.	55a
Excerpts from Deposition of Elise David McMillan	72a
Excerpts from Deposition of Imogene Stoneking	82a
9. Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment ..	85a
10. Defendant's Motion to Suppress Revisions of Plaintiff's Deposition	93a

Item:

Page:

1a

11. Defendant's Memorandum of Law in Support of Motion to Suppress Revisions of Plaintiff's Deposition (Excerpts) 94a
12. Exhibits to Defendant's Motion to Suppress Revisions of Plaintiff's Deposition 102a
13. Excerpts from Deposition of Christine McKennon 117a
14. Decision of the United States District Court for the Middle District of Tennessee, June 3, 1992, is set out in the Appendix to the Petition for a Writ of Certiorari at pp. 10a-18a
15. Decision of the United States Court of Appeals for the Sixth Circuit, November 15, 1993, is set out in the Appendix to the Petition for a Writ of Certiorari at pp. 1a-9a

RELEVANT DOCKET ENTRIES

5/6/91	1	COMPLAINT (Summons(es) issued) Filing fee paid in the amount of : \$120 Receipt # 32286 (ks) [Entry date 09/11/91]
6/17/91	2	ANSWER by defendant Nashville Banner to [1-1] (ks) [Entry date 09/11/91]
1/7/92	7	MOTION by defendant for summary judgment (ks) [Entry date 01/08/92]
1/7/92	9	STATEMENT of facts by defendant in support of motion for summary judgment [7-1] (ks) [Entry date 01/08/92]
3/10/92	20	NOTICE by defendant of filing original affidavits of Elise D. McMillan, Irby C. Simpkins, Jr., Edward F. Jones and Imogene L. Stoneking in support of defendant's motion for summary judgment. (ks)
3/10/92	21	AFFIDAVIT of Irby C. Simpkins, Jr. in support of defendant's motion for summary judgment [7-1] (ks)
3/10/92	22	AFFIDAVIT of Edward F. Jones in support of defendant's motion for summary judgment [7-1] (ks)
3/10/92	23	AFFIDAVIT of Elise D. McMillan in support of defendant's motion for summary judgment [7-1] (ks)

- 3/10/92 24 AFFIDAVIT of Imogene L. Stoneking in support of defendant's motion for summary judgment [7-1] (ks)
- 3/16/92 25 RESPONSE by plaintiff to defendant's motion for summary judgment [7-1] with Exhibit A attached. (ks) [Entry date 03/17/92]
- 3/16/92 27 AFFIDAVIT of Gene McKennon in support of plaintiff's response [25-1] to defendant's motion for summary judgment (ks) [Entry date 03/17/92]
- 3/16/92 28 AFFIDAVIT of Christine McKennon in support of plaintiff's response [25-1] to defendant's motion for summary judgment. (ks) [Entry date 03/17/92]
- 3/20/92 29 REPLY by defendant Nashville Banner to plaintiff's response to motion for summary judgment [7-1] with Exhibits A-G attached. (ks) [Entry date 03/23/92]
- 4/8/92 32 MOTION by defendant to suppress revisions of plaintiff's deposition with Exhibits A-D attached. (ks)
- 4/8/92 33 DECLARATION by Teri Campbell in support of defendant's motion to suppress [32-1]. Declaration is Exhibit C to motion. (ks)
- 4/8/92 34 MEMORANDUM by defendant Nashville Banner in support of motion to suppress revisions of plaintiff's deposition [32-1].(ih)

- 4/10/92 38 NOTICE by defendant of filing original deposition and copies of excerpts of depositions. (ks) [Entry date 04/12/92]
- 4/14/92 42 NOTICE by plaintiff of filing documents to supplement response to defendant's motion for summary judgment with documents attached. (This pleading was submitted under seal, no order has been entered allowing filing under seal.) (ks) [Entry date 04/20/92]
- 4/17/92 43 SECOND SUPPLEMENTAL AUTHORITY by defendant in support of motion for summary judgment [7-1] with attachment. (ks) [Entry date 04/20/92]
- 4/21/92 44 RESPONSE by plaintiff to defendant's motion to suppress revisions of plaintiff's deposition [32-1] with Exhibits 1 and 2 attached. (ks) [Entry date 04/22/92]
- 4/27/92 45 REPLY by defendant to plaintiff's response to motion to suppress revisions of plaintiff's deposition [32-1]. (ks) [Entry date 04/28/92]
- 6/3/92 47 ORDER by Judge Thomas A. Higgins: In accordance with memorandum, defendant's motion for summary judgment [7-1] is granted. Dismissing case with prejudice. The entry of this order shall constitute the judgment in this action. (cc: all counsel) (ks) [Entry date 06/04/92]

6/26/92 48

NOTICE OF APPEAL by plaintiff
Christine McKennon from Dist. Court
decision, [47-2] (mg) [Entry date
07/01/92]

7/29/92 57

ORDER by Judge Thomas A. Higgins
denying motion for sanctions and fees
[49-1] (cc: all counsel) (mg)

No. 3-91-0346
Filed May 06, 1991

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

CHRISTINE MCKENNON,

Plaintiff, JURY DEMAND
JUDGE HIGGINS

vs.

THE NASHVILLE BANNER PUBLISHING CO.,
INC.

Defendant.

COMPLAINT

Pursuant to the Federal Rules of Civil Procedure, and other applicable law, plaintiff Christine McKennon hereby sues defendant Nashville Banner Publishing Co., Inc. and in support thereof would show the Court the following:

1. Plaintiff CHRISTINE MCKENNON (hereinafter "Ms. McKennon") is an adult citizen of Tennessee residing at 321 Harbour Drive, Wilson County, Tennessee 37138. Ms. McKennon's address for the purpose of this lawsuit shall be her counsel's address.

2. Defendant NASHVILLE BANNER PUBLISHING CO., INC., (hereinafter "Banner") is a for profit Tennessee corporation, engaged in the business of publishing a newspaper in Middle Tennessee, known as the Nashville Banner. The stock of the Banner is owned 100% by Brownlee O. Currey and Irby C. Simpkins, two (2) adult

citizens residing in Middle Tennessee. Brownlee O. Currey holds, and held during the relevant time, the position of Chairman of the Board of the Nashville Banner Publishing Co., Inc. Irby C. Simpkins holds, and held during the relevant time, the office of President of the Nashville Banner Publishing Co., Inc. The Banner's agent for service of process is Claudia R. Allison, 1100 Broadway, Nashville, TN 37203.

3. The cause of action is age discrimination. This suit is brought pursuant to the provisions of and in accordance with the Age Discrimination in Employment Act (ADEA) 29 U.S.C. 621, *et seq.* and the Tennessee Human Rights Act (THRA T.C.A. 4-21-101, *et seq.*

4. The Banner is an employer for the purposes of the ADEA and THRA. The Banner employs more than 30 persons. The discriminatory acts herein described occurred on or about October 31, 1990 and plaintiff filed a written charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") within 180 days of the alleged discriminatory acts. The charge was filed with the EEOC on or about December 6, 1990, as required by the ADEA. This suit is filed more than 60 days after the filing of the charge.

5. This Court has jurisdiction to determine claims of age discrimination pursuant to both the ADEA and THRA. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367, and other appropriate provisions and principles of law. The discriminatory acts complained of occurred in Davidson County, Tennessee. Venue is proper.

6. Christine McKennon was born on December 31, 1927 and at the time of the discriminatory acts alleged herein was 62 years old.

7. Ms. McKennon was employed by the Banner on or about May 14, 1951 and assigned the job title Ad

Taker. On or about June 22, 1952, Ms. McKennon assumed the job title Secretary, and continued to work as a secretary at the Banner until she was terminated on October 31, 1990. During her 39 years at the Banner, Ms. McKennon worked as secretary to six (6) different individuals, and as secretary to the national advertising manager, and as secretary to the classified advertising staff. In each of these positions Ms. McKennon was evaluated and her performance was consistently rated as excellent.

8. From February 26, 1982 until March 6, 1989, Ms. McKennon held the position of secretary to Jack Gunter, Executive Vice President. In 1989 Gunter's job assignment changed and Ms. McKennon was reassigned as secretary to Imogene Stoneking, Comptroller. Ms. McKennon held this position from March 6, 1989 until her termination on October 31, 1990. In this position Ms. McKennon's duties included maintaining personnel files, working on preparation of the annual budget, maintaining petty cash vouchers for expense reimbursements, processing time sheets, making travel arrangements, directing the personnel department regarding employee changes, and other duties including miscellaneous tasks assigned directly by Imogene Stoneking.

9. After Ms. McKennon's reassignment as secretary to the Comptroller, she began to experience a pattern of conduct designed and intended to force her resignation and/or retirement. The Banner's agents began a conscious and willful effort to force her retirement and/or resignation by reducing Ms. McKennon's job benefits and privileges and intentionally and willfully modifying her working conditions. For example, certain Banner agents, between April 1989 and October 1990, acting together, eliminated Ms. McKennon's parking privileges, modified her vacation privileges, changed her lunch hour privileges, altered her compensatory time privileges, threatened to require weekend work, and denied an appropriate pay raise. These acts and others were willful and intentional

misconduct undertaken to force Ms. McKennon's retirement. Plaintiff alleges that defendant's harassment and discrimination were predicated upon plaintiff's age and defendant's intention to force her retirement. These were discriminatory acts taken against Ms. McKennon in contravention of the ADEA and THRA.

10. For more than one (1) year Ms. McKennon's immediate supervisor, Imogene Stoneking, acting on behalf of Irby Simpkins, publisher, and Brownlee O. Currey, chairman of the board, sought Ms. McKennon's retirement. Ms. Stoneking began to suggest retirement to Ms. McKennon, and when this strategy failed, began to implement the discriminatory practices described above to force resignation and/or retirement.

11. On or about October 31, 1990 Ms. McKennon was summoned to a meeting at the office of Imogene Stoneking without prior warning. Present were Elise McMillan, general counsel of the Banner, Tony Kessler, managing editor, and Ms. Stoneking. Without any notice or warning, Ms. McKennon was told she was being immediately terminated. The only explanation offered to Ms. McKennon was "staff reduction". Ms. McKennon was presented with a 5 page "release agreement", which had been prepared by counsel for the Banner. Ms. McKennon was told to review the release agreement and sign it in order to receive any severance pay. Ms. McKennon was told that if she did not sign the release agreement, she would receive no severance pay.

12. Ms. McKennon was invited to immediately attend another meeting held by publisher Irby Simpkins. That meeting lasted about 20 minutes, and then plaintiff was directed to return to her desk, clean out her work area, and exit the building. Specifically, Ms. McKennon was approached by her supervisor, Imogene Stoneking, and told "don't shred anything" and "I can't leave until you leave". Ms. Stoneking then monitored Ms. McKennon's departure,

ushered her to the door, demanded her Banner ID card, and after 39 years of service, Christine McKennon was directed to leave the Banner's property.

13. The day after Ms McKennon was terminated the Banner caused to be published in the Middle Tennessee area an announcement that Ms. McKennon had sought early retirement. This publication by the Banner was false, and the persons who caused the publication knew or should have known the information contained therein was false. This false publication was part of the Banner's strategy to illegally terminate the employment of Christine McKennon.

14. At the time of Christine McKennon's termination, the Banner employed at least six (6) other secretaries. The two oldest secretaries, including the plaintiff, were terminated. Of the remaining five secretaries, none had more than twelve (12) years of service with the Banner. Two (2) of the remaining secretaries were less than 40 years old. The two (2) youngest secretaries both had less than six (6) months' experience with the Banner. None of the five (5) secretaries, who remained after Christine McKennon's termination, possessed any qualifications superior to the qualifications of Ms. McKennon. None of the secretaries, who remained after Christine McKennon's termination, performed duties which Ms. McKennon was unable to perform. At the time Ms. McKennon was terminated, she was older than, more qualified than, and more experienced than any of the five (5) secretaries who remained.

15. The termination of Christine McKennon's employment was an illegal discriminatory act and/or practice. The pattern of conduct, referenced above, which preceded Ms. McKennon's termination were illegal and discriminatory acts and/or practices. The termination of Ms. McKennon was an illegal and discriminatory act. These acts and practices violate both the ADEA and the THRA, in that these discriminatory and illegal acts were based upon the age

of plaintiff. The Banner's decision to terminate Ms. McKennon and the Banner's strategy to implement this decision were based upon her age.

16. At the time of her termination, Ms. McKennon's annual salary was approximately \$26,437. Ms. McKennon has suffered the loss of this income and certain employment benefits, including medical insurance, as a direct and proximate result of defendant's illegal acts.

17. Defendant's illegal and discriminatory acts were planned, calculated, counseled, intentional, and wilful. Defendant has willfully violated the ADEA and THRA, and Ms. McKennon's federal and state statutory rights. Ms. McKennon is entitled to liquidated damages, or an award doubling the compensation and/or actual damages.

18. Ms. McKennon was terminated after 39 years of service on her 36th wedding anniversary with no notice. Ms. McKennon was summarily and abrasively treated by Banner's agents, insulted, and ushered rudely from the premises, after being directed to gather her belongings and leave. The Banner then falsely and knowingly caused her termination to be published as an "early retirement". Since her termination, Ms. McKennon has continued to suffer embarrassment and humiliation as a direct result of defendant's illegal and discriminatory acts. Ms. McKennon was embarrassed and humiliated by defendant's acts, and is entitled to damages for these injuries.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That this complaint be filed and served upon defendant and that answer be required within the time allowed by law;
2. For trial by jury;
3. For judgment against defendant awarding compensatory damages, actual damages, and appropriate

equitable relief including back pay and prospective (front) pay;

4. For a judgment against defendant awarding liquidated damages for defendant's willful violation;

5. For a judgment against defendant awarding damages for the humiliation and embarrassment caused by the discriminatory practices;

6. For an order directing defendant to pay all costs of this litigation, and plaintiff's reasonable attorney fees;

7. For interest on all amounts due calculated from the date this action is filed;

8. For any other appropriate relief.

RESPECTFULLY SUBMITTED

[Caption Omitted]

ANSWER TO COMPLAINT AND AFFIRMATIVE
DEFENSES OF THE
NASHVILLE BANNER PUBLISHING CO.

Defendant, The Nashville Banner Publishing Co. (hereinafter referred to as the "*Nashville Banner*"), answers Plaintiff's Complaint as follows:

Answer

1. The *Nashville Banner* denies knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 1 of the Complaint.

2. The *Nashville Banner* admits the averments contained in Paragraph 2 of the Complaint, except avers that the proper name of Defendant is Nashville Banner Publishing Co., and that the proper names of Mr. Currey and Mr. Simpkins are Brownlee O. Currey, Jr., and Irby C. Simpkins, Jr.

3. The *Nashville Banner* denies each and every averment contained in Paragraph 3 of the Complaint, except admits Plaintiff purports to bring an action under the Age Discrimination in Employment Act and the Tennessee Human Rights Act.

4. The *Nashville Banner* denies knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 4 of the Complaint, except admits that it employs more than 30 persons and that Plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission dated December 6, 1990.

5. The *Nashville Banner* denies knowledge or information sufficient to form a belief as to the truth of the

averments contained in Paragraph 5 of the Complaint, except admits that Plaintiff purports to invoke the jurisdiction and venue of this Court.

6. The *Nashville Banner* denies knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 6 of the Complaint.

7. The *Nashville Banner* denies each and every averment contained in Paragraph 7 of the Complaint, except admits that Plaintiff was terminated on October 31, 1990.

8. The *Nashville Banner* denies each and every averment contained in Paragraph 8 of the Complaint, except admits that Plaintiff was secretary to Jack Gunter from 1982 to 1989, that Plaintiff was secretary to Imogene Stoneking from 1989 to 1990, and that Plaintiff performed customary secretarial duties while employed at the *Nashville Banner*.

9. The *Nashville Banner* denies each and every averment contained in Paragraph 9 of the Complaint.

10. The *Nashville Banner* denies each and every averment contained in Paragraph 10 of the Complaint.

11. The *Nashville Banner* denies each and every averment contained in Paragraph 11 of the Complaint, except admits that Ms. Stoneking, Mr. Kessler and Ms. McMillan met with Plaintiff on or about October 31, 1990, in the office of Ms. Stoneking to explain to Plaintiff that she was being terminated as part of a reduction in staff and to give her a severance check. As was the case with all individuals terminated as part of this reduction in staff, Plaintiff was offered additional severance as part of a release agreement that had been prepared by counsel for the *Nashville Banner*.

12. The *Nashville Banner* denies each and every averment contained in paragraph 12 of the Complaint, except admits that Plaintiff attended a staff meeting at which publisher Irby Simpkins spoke. The *Nashville Banner* further

admits that Plaintiff was asked to return her Banner ID card, that Plaintiff was asked by Ms. Stoneking to stop shredding documents when Ms Stoneking observed Plaintiff shredding documents, and that Plaintiff was advised by Ms. Stoneking that Ms. Stoneking could not leave until Plaintiff left.

13. The *Nashville Banner* denies each and every averment contained in Paragraph 13 of the Complaint.

14. The *Nashville Banner* denies each and every averment contained in Paragraph 14 of the Complaint, except admits that as part of a reduction in staff two secretaries who were older than the other secretaries were terminated and that two of the remaining secretaries were less than 40 years old and had been employed at the *Nashville Banner* for less than six months.

15. The *Nashville Banner* denies each and every averment contained in Paragraph 15 of the Complaint.

16. The *Nashville Banner* denies each and every averment contained in Paragraph 16 of the Complaint, except admits that Plaintiff's annual salary was approximately \$26,437 at the time of her termination.

17. The *Nashville Banner* denies each and every averment contained in Paragraph 17 of the Complaint.

18. The *Nashville Banner* denies each and every averment contained in paragraph 18 of the Complaint.

19. All averments to which no specific response has been made herein are denied.

20. The *Nashville Banner* denies that Plaintiff is entitled to any relief prayed for in the Complaint.

Affirmative Defenses

First Affirmative Defense

21. Plaintiff's Complaint fails to state a claim

upon which relief may be granted.

Second Affirmative Defense

22. Plaintiff was discharged for legitimate, non-discriminatory business reasons.

Third Affirmative Defense

23. Plaintiff was an employee-at-will and could be terminated at any time without cause by the *Nashville Banner*.

Fourth Affirmative Defense

24. Any damage with respect to which any claim is asserted against Defendant results from acts, omissions, or events other than any alleged acts or omissions of the *Nashville Banner* contained in the Complaint.

Fifth Affirmative Defense

25. Plaintiff has failed to take reasonable steps to minimize and mitigate any alleged damages which she could have avoided.

Sixth Affirmative Defense

26. Plaintiff is estopped by her own acts, conduct, or omissions from asserting some or all of the claims contained in the Complaint.

Seventh Affirmative Defense

27. Plaintiff has failed to exhaust available and requisite administrative remedies.

Eighth Affirmative Defense

28. Plaintiff was terminated on the basis of reasonable factors other than age.

Ninth Affirmative Defense

29. The Complaint fails to state a claim or cause

of action against the *Nashville Banner* for an award of liquidated or statutory damages.

WHEREFORE, the *Nashville Banner* demands judgment dismissing the Complaint against it together with an award of its costs and disbursements, including an award of attorneys' fees and for such other and further relief as this Court deems appropriate.

Respectfully submitted,

[Caption Omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant, The Nashville Banner Publishing Co., by and through its attorneys, moves this Court for the entry of an order granting Defendant summary judgment. As grounds for this Motion, Defendant states that there are no genuine issues of material fact necessary to render a decision on Plaintiff's age discrimination claims in this cause and that it is entitled to judgment as a matter of law.

In support of this Motion for Summary Judgment, Defendant has simultaneously filed herewith a Statement of Undisputed Facts, a Memorandum of Law more fully articulating the reasons upon which this Motion should be granted, as well as other supporting evidentiary materials.

WHEREFORE, Defendant respectfully requests that the Court grant its Motion for Summary Judgment and dismiss this case.

Respectfully submitted,

[Caption Omitted]

STATEMENT OF UNDISPUTED MATERIAL
FACTS IN SUPPORT OF DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Pursuant to Local Rule 8(b) 7(b) Defendant, The Nashville Banner Publishing Co. ("The Company"), hereby submits the following statement of undisputed material facts that entitle it to judgment as a matter of law.¹

2. The Company is engaged in the business of publishing a daily newspaper known as the *Nashville Banner*. (Complaint, ¶ 2; Answer, ¶ 2).

3. Brownlee O. Currey, Jr. is the Chairman of the Board of the Company. Irby C. Simpkins, Jr. is President of the Company and Publisher of the *Nashville Banner*. (Complaint, 2; Appendix J, ¶ 1). Imogene L. Stoneking is the Company's Comptroller. (Appendix L, ¶ 1; Complaint, ¶ 8). Elise D. McMillan is the Company's General Counsel and Executive Vice President for Administration. (Appendix M, ¶ 1). Edward F. Jones is the Editor of the *Nashville Banner*. (Appendix K, ¶ 1).

4. Plaintiff was employed as secretary to Ms. Stoneking from March, 1989 until October 21, 1990. (Complaint, ¶ 8; Answer, ¶ 8; Appendix 1, ¶ 2). Plaintiff was an employee-at-will. (Appendix A). She was separated from employment on October 31, 1990. (Complaint, ¶ 11, Answer, ¶ 1). On May 6, 1991, Plaintiff instituted the

¹ For purposes of this Statement of Undisputed Material Facts, the Company will accept as true a number of Plaintiff's factual assertions because even if they were true, the Company would still be entitled to summary judgment. the Company does not waive the right to present additional or contradictory evidence at trial.

present action. (Complaint).

5. Plaintiff's duties as secretary to the Comptroller included maintaining personnel files, assisting in the preparation of the Company's annual budget, processing time sheets, and various other tasks assigned to her by Ms. Stoneking. (Complaint, ¶ 8).

6. In her position as the Comptroller's secretary, Plaintiff had access to proprietary and confidential documents and information, such as payroll data, financial information, personnel files and other confidential records. (Appendix 1, ¶ 2). Plaintiff understood that this information was confidential and proprietary business information. (Appendix B, p. 136). She was aware that this information was to be kept confidential and was not to be disclosed outside the workplace or to individuals within the Company who were not authorized to have the information. (Appendix B, p. 136). Plaintiff further understood that a failure to keep these documents and records confidential consistent with her position and obligations could have resulted in her termination. (Appendix B, p. 137). Plaintiff knew that the Company was relying upon her not to disclose the confidential information to which she had access. (Appendix B, pp. 137, 142).

7. Through interrogatories and document requests, the Company discovered that Plaintiff apparently had in her possession copies of confidential and proprietary documents belonging to the Company. During Plaintiff's deposition on December 18, 1991, the Company for the first time learned that while employed Plaintiff had copied and removed from its premises those confidential documents. (Appendix J, ¶ 4). Plaintiff did not tell anyone at the Company that she had taken those confidential materials until her deposition. (Appendix C, pp. 196-99).

8. Plaintiff revealed in her deposition that in the fall of 1989, she photocopied and removed from the

Company's premises the Nashville Banner Fiscal Payroll Ledger. (Appendix C, 196-200; Appendix D). Plaintiff obtained this document in her role as the Comptroller's confidential secretary. (Appendix C, p. 197). She understood that it was a highly confidential document. (Appendix C, p. 197). Plaintiff did not tell the Comptroller or anyone else that she had copied this document or that she was removing it from the Company's premises. (Appendix C, p. 197). Plaintiff copied the document and removed it from the premises knowing that she was not authorized to do so. (Appendix C, p. 199-200). She did this after being specifically instructed by the Comptroller to shred the document. (Appendix C, pp. 198-99). A redacted copy of this document is attached as Appendix D.

9. Plaintiff also copied and removed from the Company's premises the Nashville Banner Publishing Co.'s Profit and Loss Statement in the fall of 1989. (Appendix E, pp. 200-02; Appendix F). This document was also highly confidential and obtained by Plaintiff in her role as the Comptroller's confidential secretary. (Appendix E, p. 201). Plaintiff was given this document by the Comptroller to shred but made a copy of it instead. (Appendix E, p. 202). Once again, Plaintiff did not tell anyone at the Company that she had copied this document or that she had removed it from the premises. (Appendix E, p. 202). Plaintiff understood that she was not authorized to copy the Profit and Loss Statement or to remove it from the Company's premises. (Appendix E, p. 202). A redacted copy of this document is attached as Appendix F.

10. In the summer of 1989, Plaintiff copied and removed from the Company's premises a series of documents and an agreement relating to a Company manager. (Appendix G, pp. 203-05; Collective Appendix H). Plaintiff had removed these documents from the manager's personnel file. (Appendix G, pp. 203-05). She did not tell anyone at the Company that she had copied the documents. (Appendix G, p. 204). After copying the documents, she

removed them from the Company's premises, and revealed their contents to other persons. (Appendix G, pp. 204-05). Once again, Plaintiff understood she was not authorized to copy these documents or to remove them from the Company's premises. (Appendix G, p. 205). She further understood that these were also highly confidential documents. (Appendix G, pp. 214-215). Redacted copies of these documents are attached as collective Appendix H.

11. Plaintiff was informed by letter dated December 20, 1991, that her actions constituted deliberate misconduct involving breach of trust and confidentiality obligations essential to her position as a confidential secretary. (Appendix I).

12. Had the Company been aware of Plaintiff's breach of confidentiality and misconduct at the time it occurred or at any time thereafter, it would have terminated her immediately. (Appendix I, J, K, L).

Respectfully submitted,

**EXHIBITS TO DEFENDANT'S UNDISPUTED
FACTS IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

[Note: information redacted pursuant to district court's
privacy order is indicated by brackets "{ }"]

**ACKNOWLEDGMENT OF RECEIPT OF
NASHVILLE BANNER EMPLOYEE HANDBOOK**

I acknowledge receipt of the Nashville Banner Employee Handbook and I have read and understand its contents. I understand that the policies and guidelines set forth in this handbook should not be construed as express or implied contractual guarantees regarding my employment relationship with the Nashville Banner.

I understand and agree that my employment relationship will continue to be an employment at the continuing will of both parties for no definite duration and that either party remains free to terminate the relationship at any time.

s/ Chris McKennon
Signature of Employee

Feb. 28, 1990
Date

1/1/90

**NASHVILLE BANNER
FISCAL PERIOD PAYROLL LEDGER**

AS-OF DATE : 09/30/89
PERIOD ENDING : 09/30/89

EMP NO.	EMPLOYEE NAME	FOLIO	G/L ACCT	CUR FISCAL
------------	---------------	-------	-------------	---------------

101	CURREY, BROWNLEE O. JR.			{All pay information redacted}
	CHECK # 1660 CD1			
	CHECK # 1660 CD1			
	CHECK # 1675 CD1			

**EMPLOYEE SUMMARY
WAGES SALARIES
ACCRUED FICA
ACCRUED FED W/H
NET PAY**

102	SIMPKINS, IRBY C. JR.
	CHECK # 1661 CD1
	CHECK # 1661 CD1
	CHECK # 1676 CD1
	CHECK # 1676 CD1

**EMPLOYEE SUMMARY
WAGES SALARIES
ACCRUED FICA
ACCRUED FED W/H
NET PAY**

104	ELLSWORTH, BETTY MCPEAK
	CHECK # 1662 CD1
	CHECK # 1662 CD1
	CHECK # 1662 CD1
	CHECK # 1662 CD1
	CHECK # 1662 CD1

24a

CHECK # 1662 CD1
CHECK # 1677 CD1
CHECK # 1677 CD1
CHECK # 1677 CD1
CHECK # 1677 CD1
CHECK # 1677 CD1
CHECK # 1677 CD1

EMPLOYEE SUMMARY
WAGES SALARIES
ACCRUED FICA
ACCRUED FED W/H
ACCRUED CREDIT UNION
ACCRUED PROFIT SHARE
ACCRUED UNITED WAY
ACC PARKING - TENN
NET PAY

105 ALLISON, CLAUDIA
CHECK # 1663 CD1
CHECK # 1663 CD1
CHECK # 1663 CD1
CHECK # 1663 CD1
CHECK # 1663 CD1
CHECK # 1663 CD1
CHECK # 1678 CD1
CHECK # 1678 CD1
CHECK # 1678 CD1
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CHECK # 1678 CD1
CHECK # 1678 CD1

EMPLOYEE SUMMARY
WAGES SALARIES
ACCRUED FICA
ACCRUED FED W/H
ACCRUED CREDIT UNION
ACCRUED PROFIT SHARE

25a

ACCRUED UNITED WAY
ACC PARKING - TENN
NET PAY

106 STONEKING, IMOGENE
CHECK # 1664 CD1
CHECK # 1664 CD1
CHECK # 1664 CD1
CHECK # 1664 CD1
CHECK # 1664 CD1
CHECK # 1664 CD1
CHECK # 1679 CD1
CHECK # 1679 CD1
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CHECK # 1679 CD1

EMPLOYEE SUMMARY
WAGES SALARIES
ACCRUED FICA
ACCRUED FED W/H
ACCRUED CREDIT UNION
ACCRUED PROFIT SHARE
ACC PARKING - TENN
NET PAY

107 JONES, EDWARD
CHECK # 1665 CD1
CHECK # 1665 CD1
CHECK # 1665 CD1
CHECK # 1665 CD1
CHECK # 1680 CD1
CHECK # 1680 CD1
CHECK # 1680 CD1

26a

NASHVILLE BANNER PUBLISHING CO., INC.

PROFIT & LOSS STATEMENT
STATEMENT OF INCOME/(LOSS) AND
ACCUMULATED DEFICIT

TEN MONTHS ENDED	OCTOBER 1989	OCTOBER 1988
------------------	-----------------	-----------------

REVENUE

\$ OF TENNESSEAN INCOME {All income information
redacted}

OTHER INCOME

COSTS AND EXPENSES:

EDITORIAL
GENERAL AND ADMINISTRATIVE
DEPRECIATION AND AMORTIZATION
INTEREST EXPENSE

TOTAL EXPENSES

NET PROFIT/LOSS BEFORE INCOME TAX

INCOME TAX

NET PROFIT/LOSS AFTER INCOME TAX

DIVIDENDS

OCTOBER 30, 1989

27a

Simpkins

July 1

Attached is a copy of the contract given to {name
redacted}.

Elise

NASHVILLE BANNER
1100 Broadway
Nashville, Tenn. 37203

Elise McMillan Phone (615) 259-8202
 General Counsel and
 Executive Vice President, Administration

DATE: February 23, 1989

TO: { }

FROM: Elise D. McMillan

{ } following is a brief overview of benefits to which { } is entitled. As I mentioned earlier, estimates are included and { }.

Life insurance - { } policies in the amount of { } and { }. These are available only to employees.

Medical insurance - Coverage under the { } plan for { } and { }. As an employee, { } would { } the same { } as other full-time employees. We currently continue to { }.

Pension plan - As an employee, { } would { } plan. The { }. With retirement { }, { } would { } \$ { } annually from our { }. This is an estimate that would depend on the type of the payment from the plan that { } and { } choose.

Thrift plan - As of January 1, 1989, { } had about \$ { } in the { } plan. Under this plan we { } plan. { } account in the plan would { }. Money from the { } can be { } under only three circumstances - { }.

These are the highlights. I'll be glad to go into more detail with you on these or explain any other benefits you may

have questions about.

EDM:hf

cc: Irby C. Simpkins

NASHVILLE BANNER
1100 Broadway
Nashville, Tenn. 37203

TO: IRBY C. SIMPKINS, JR.

FROM: IMOGENE STONEKING

DATE: FEBRUARY 3, 1989

RE: { }

{ }

1. Although { } will { } his salary { } with { } .
Estimated cost to company - salary plus any benefits
determined - { } .
2. Retain { } . Cost to company - { } - estimated
{ } .
3. To purchase { } . Estimated { } .

As a { } cost - under { } - { } annually.

As a { } cost is { } annually.

Retirees do not have { } coverage.

At { } would no longer { } and this would amount to an
approximate { } . This is an estimate that will depend on
the type of { } .

As of January 1, 1989 { } would { } from the { } .

cc Eddie Jones
Elise McMillan

2/8

{ }

{ }

{ }

\$ { } annually

{ }

{ }

full { } package

can request { } prior approval

include { }

{ }

{ }

perform { } duties

available assyn. { }

inkeeping assyn. { }

for company

prior approval { }

at time terms & conditions

commitment continues beyond { } { } { } of Banner
{ } or assignee right to { } & purchase { } & continue
obligations { }

office { } { } { }

disability

right - { }

death? ----- terminates at { }

{ }

20. The Banner may { } { } { } { } { } { }

{ } { } { } { } { } { } { } { } { } { } { } { } { } { }

s/ _____
Notary Public
My Commission expires June 4, 1990

[Caption Omitted]

NOTICE OF FILING ORIGINAL AFFIDAVITS

Please take notice that on this 10th day of March, 1992, the original affidavits of Elise D. McMillan, Irby C. Simpkins, Jr., Edward F. Jones, and Imogene L. Stoneking, have been filed in support of Defendant's pending Motion for Summary Judgment filed on January 7, 1992. Copies of these affidavits were filed as Appendices I, J, K, and L on January 7, 1992, and Defendant hereby files the original affidavits as well.

Respectfully submitted,

KING & BALLOW

[Caption Omitted]

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

AFFIDAVIT OF IRBY C. SIMPKINS, JR.

1. I, Irby C. Simpkins, Jr., am Publisher of the *Nashville Banner* and President of the Nashville Banner Publishing Co., ("the Company").

2. From approximately March, 1989, through October, 1990, Christine McKennon held the position of secretary to Imogene Stoneking, Comptroller. In this position, Ms. McKennon had access to proprietary and confidential documents and information. These documents included payroll data, financial information, personnel and other confidential files.

3 I have been advised that during her deposition on December 18, 1991, Ms. McKennon admitted to having copied and removed from the Company's premises proprietary and confidential documents and information that she had access to by virtue of her employment as Ms. Stoneking's secretary. Ms. McKennon was not authorized to do this. I have been advised that she, in fact, admitted that she was not authorized to do so. Ms. McKennon did not advise me about or seek my consent to her actions. I am told that she admitted that she did not advise any other officer or manager of the Company about or seek their consent to her actions.

4. Ms. McKennon's actions constituted obvious and deliberate misconduct involving breach of trust and confidentiality obligations. When she admitted these actions during her deposition, it was the first time I or the Company knew of this misconduct.

5. Had I learned of Ms. McKennon's misconduct

36a

at any time prior to her separation from the employment on October 31, 1990, I would have terminated her immediately. Once I learned of her admissions, I wrote her a letter dated December 20, 1991, setting forth this fact. A copy of this letter is attached hereto as Appendix A.

FURTHER AFFIANT SAITH NOT.

S/S

Irby C. Simpkins, Jr.

37a

Nashville Banner
1100 Broadway
Nashville, Tenn. 37203

Irby C. Simpkins, Jr.
President and Publisher

Phone (615) 259-8201

December 20, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Christine McKennon
321 Harbour Drive
Old Hickory, TN 37138

Dear Ms. McKennon:

During your deposition on December 18, 1991, you admitted under oath that you engaged in conduct that constituted breaches of your duties and responsibilities while you were employed by the Nashville Banner Publishing Company. This is the first time that the Company knew of your misconduct.

Specifically, you testified that on at least two separate occasions, you surreptitiously photocopied proprietary and confidential documents and information to which you had access by virtue of your employment as a confidential secretary. You then removed these copies from the premises and converted them to your own use. In one instance, despite having been instructed to shred documents, you copied and purloined them. Other confidential documents you copied were removed from the personnel or related files pertaining to an executive of the Company.

You of your own admission took these actions without the knowledge or consent of any officer or manager of the

Company. Your further admitted that you took these actions knowing that you were not authorized to do so.

Had the Company discovered your actions when you took them, you would have been terminated immediately. Similarly, if your actions had been discovered at any time prior to your separation from employment on October 31, 1990, you would have been terminated immediately. If you were presently employed with the Company, you would be terminated immediately.

Such obvious and deliberate misconduct involving breach of trust and confidentiality obligations simply could not or will not be condoned or tolerated. We trusted you as the custodian of our Company's most sensitive financial and personnel information and your willful breach of that trust could or can only result in immediate termination.

Sincerely,

S/S

Irby C. Simpkins, Jr.

ICSjr:tt

[Caption Omitted]

STATE OF TENNESSEE
COUNTY OF DAVIDSON

AFFIDAVIT OF EDWARD F. JONES

1. I, Edward F. Jones, am Editor of the *Nashville Banner*, published by the Nashville Banner Publishing Co. ("the Company").

2. From approximately March, 1989, through October, 1990, Christine McKennon held the position of secretary to Imogene Stoneking, Comptroller. In this position, Mc. McKennon had access to proprietary and confidential documents and information. These documents included payroll data, financial information, personnel and other confidential files.

3. I have been advised that during her deposition on December 18, 1991, Ms. McKennon admitted to having copied and removed from the Company's premises proprietary and confidential documents and information that she had access to by virtue of her employment as Ms. Stoneking's secretary. Ms. McKennon was not authorized to do this. I have been advised that she, in fact, admitted that she was not authorized to do so. Ms. McKennon did not advise me about or seek my consent to her actions. I am told that she admitted that she did not advise any other officer or manager of the Company about or seek their consent to her actions.

4. Ms. McKennon's actions constituted obvious and deliberate misconduct involving breach of trust and confidentiality obligations. When she admitted these actions during her deposition, it was the first time I knew of this misconduct.

5. Had I learned of Ms. McKennon's misconduct at any time prior to her separation from employment on

October 31, 1990, I would have terminated her immediately.

FURTHER AFFIANT SAITH NOT.

S/S

Edward F. Jones,

[Caption Omitted]

STATE OF TENNESSEE
COUNTY OF DAVIDSON

AFFIDAVIT OF IMOGENE L. STONEKING

1. I, Imogene L. Stoneking, am Comptroller for the Nashville Banner Publishing Co. ("the Company").

2. From approximately March, 1989, through October, 1990, Christine McKennon held the position as my secretary. In this position, Ms. McKennon had access to proprietary and confidential documents and information. These documents included payroll data, financial information, personnel and other confidential files.

3. During her deposition on December 18, 1991, Ms McKennon admitted to having copied and removed from the Company's premises proprietary and confidential documents and information that she had access to by virtue of her employment as my secretary. Ms. McKennon was not authorized to do this and, in fact, admitted that she was not authorized to do so. Ms. McKennon did not advise me about or seek my consent to her actions, and she admitted that she did not advise any other officer or manager of the Company about or seek their consent to her actions.

4. Ms. McKennon's conduct constituted obvious and deliberate misconduct involving breach of trust and confidentiality obligations. When she admitted these actions during her deposition, it was the first time I knew of this misconduct.

5. Had I known of Ms. McKennon's misconduct at any time prior to her separation from employment on October 31, 1990, I would have terminated her immediately or, alternatively, would have recommended that she be terminated immediately.

FURTHER AFFIANT SAITH NOT.

S/S

Imogene L. Stoneking

[Caption Omitted]

STATE OF TENNESSEE

COUNTY OF DAVIDSON

AFFIDAVIT OF ELISE D. MCMILLAN

1. I, Elise D. McMillan, am General Counsel and Executive Vice President for Administration of the Nashville Banner Publishing Co. ("the Company").

2. From approximately March, 1989, through October, 1990, Christine McKennon held the position as secretary to Imogene Stoneking, Comptroller. In this position, Ms. McKennon had access to proprietary and confidential documents and information. These documents included payroll data, financial information, personnel and other confidential files.

3. During her deposition on December 18, 1991, Ms McKennon admitted to having copied and removed from the Company's premises proprietary and confidential documents and information that she had access to by virtue of her employment as Ms. Stoneking's secretary. Ms. McKennon was not authorized to do this and, in fact, admitted that she was not authorized to do so. Ms. McKennon did not advise me about or seek my consent to her actions, and she admitted that she did not advise any other officer or manager of the Company about or seek their consent to her actions.

4. Ms. McKennon's conduct constituted obvious and deliberate misconduct involving breach of trust and confidentiality obligations. When she admitted these actions during her deposition, it was the first time I knew of this misconduct.

5. Had I known of Ms. McKennon's misconduct at any time prior to her separation from employment on October 31, 1990, I would have terminated her immediately

or, alternatively, would have recommended that she be terminated immediately.

FURTHER AFFIANT SAITH NOT.

S/S

Elise D. McMillan

[Caption Omitted]

*PLAINTIFF'S STATEMENT OF DISPUTED
MATERIAL FACTS*

Pursuant to Local Rule 8, plaintiff submits this Statement of Disputed Material Facts. Accordingly, plaintiff submits that the following facts are material to defendant's Motion for Summary Judgment and that genuine issues exist regarding these facts:

1. Plaintiff did not copy the payroll ledger and profit and loss statement in the fall of 1989. Plaintiff previously testified that the documents were copied then. However, her final corrected deposition and attached affidavit indicate that the documents were copied sometime between January, 1990 and March 1990. (See affidavit, C. McKennon, paragraph 12).

2. Plaintiff did not remove the payroll ledger and profit and loss statement from The Nashville Banner premises in the fall of 1989. These documents were kept in a file cabinet after they were copied. The documents were taken to plaintiff's home during late April, 1990 or early May, 1990, after Imogene Stoneking told plaintiff that Mr Simpkins wanted a memo on plaintiff's retirement plans, and Ms. Stoneking made written inquiry to the company's pension administrator regarding plaintiff's retirement status.

3. The documents copied and later removed were approximately four (4) pages of a stack of documents which were given to plaintiff to shred. Plaintiff submits that these four (4) pages were parts of the payroll ledger and parts of the profit and loss statement. No more than four (4) pages were copied.

4. Defendant submits that "In the summer of 1989, plaintiff copied and removed . . . a series of documents and an agreement relating to a company manager." (Defendant's Undisputed Facts, paragraph 9). In fact,

plaintiff copied only the contract which was in her file cabinet, maintained by her, and to which she had full access. Also, much of the details had been related to her by Ms. Stoneking.

5. Plaintiff did not reveal the contents of the contract, or the other documents, to "other persons," plaintiff only showed the contract and other documents to her husband. After litigation was filed, plaintiff revealed the documents to her attorney. (Affidavit, C. McKennon, paragraph 13).

6. Plaintiff's conduct does not constitute "deliberate misconduct involving breach of trust and confidentiality" unless revelation to her husband is breach of trust and confidentiality. The information contained in all the documents was learned by plaintiff in the course of her employment, and her requisition of this knowledge was not wrongful. Much of the information was told to plaintiff by Ms. Stoneking and the remainder was revealed to Ms. McKennon in the course of her job.

RESPECTFULLY SUBMITTED,

[Caption Omitted]

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

AFFIDAVIT OF GENE McKENNON

1. I am the husband of the plaintiff, Christine McKennon, and we have been married for more than 37 years.

2. My wife has been employed by The Nashville Banner since 1951 and never expressed concern to me regarding her job security until March, 1989, when she informed me that her supervisor, Imogene Stoneking, had stated that Christine's employment had somehow been jeopardized during the reassignment and/or demotion of Jack Gunter. This information was shocking to Christine and I because she had always enjoyed a successful and secure job at The Nashville Banner. We had many conversations regarding the significance of Mr. Gunter's job change to Christine's employment with the Nashville Banner. We were perplexed and somewhat confused, since Christine had always enjoyed positive performance evaluations, and knew of no reason that would suggest her termination. During this time, Christine showed me a document which appeared to be Mr. Gunter's employment contract with The Nashville Banner. We read it in an effort to ascertain information that could explain Ms. Stoneking's statement regarding Christine's job security. I never distributed or shared the information in the document with anyone, except Christine.

3. During the next year, Christine's anxiety regarding her job continued to increase, and our concern seemed to be confirmed almost weekly. Christine related to me many statements made by Ms. Stoneking about such things as the feasibility of retirement, the financial plight of The Nashville Banner, and the number of secretaries.

Increasingly, Christine would discuss problems associated with parking privileges, lunch hour privileges, vacation privileges, and other work related difficulties. It seemed that what had been an excellent employment situation was rapidly deteriorating. Christine became more and more anxious as the months elapsed.

4. Near the end of 1989, or beginning of 1990, I was informed by Christine that staff reduction was being discussed, and that her supervisor seemed to be suggesting her retirement. In April, 1990, Christine informed me that Ms. Stoneking had stated that Mr. Simpkins had inquired about Christine's retirement plans, and Ms. Stoneking had sought authorization to obtain information regarding Christine's retirement benefits. These events were devastating to both of us, since Christine did not seek retirement and our earlier fears had been confirmed. We had previously discussed whether Christine's age was a factor. In April, 1990 we became convinced and we consulted with legal counsel regarding age discrimination. Shortly thereafter, either in late April, 1990 or early May, 1990, Christine showed me several pages of documents regarding The Nashville Banner's payroll and finances. We reviewed these documents together only to ascertain whether the financial explanations being offered by Ms. Stoneking were valid. The information was incomplete, and we actually reached no conclusions. I shared the information and the documents with no one, other than Christine.

FURTHER AFFIANT SAITH NOT.

S/S

GENE MCKENNON

[Caption Omitted]

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

AFFIDAVIT OF CHRISTINE MCKENNON

1. I am the plaintiff in the above styled case. I was employed by The Nashville Banner on or about May 14, 1951, and terminated on October 31, 1990. At the time of my termination I was 62 years old.

2. Throughout my tenure with The Nashville Banner, I worked as a secretary to six different individuals, and as secretary to the national advertising manager, and as secretary to the classified advertising staff. From February 26, 1982 until March 6, 1989, I held the position of secretary to Jack Gunter, Executive Vice President. In each of these positions, my performance was evaluated. My evaluations were favorable and I never received a negative performance evaluation.

3. While I was secretary to Mr. Gunter, I became familiar with Imogene Stoneking, who worked as a bookkeeper and then became Comptroller. Ms. Stoneking and I were friendly and in the years 1987-89 we talked often, almost daily. Ms. Stoneking worked directly with Irby Simpkins, the Publisher and part owner. Many of our conversations involved matters relating to Mr. Simpkins and the business of The Nashville Banner. Ms. Stoneking once said that it was good to be able to talk to someone, and that she was grateful that I was available to her.

4. During these years of conversations, Ms. Stoneking revealed many things about Mr. Simpkins and The Nashville Banner. I never solicited information from Ms. Stoneking, and I never revealed information received from her, except in occasional personal conversations with my husband. For example, Ms. Stoneking told me details concerning Mr. Simpkins' purchase of a condominium in

Florida, she told me about his purchase of a large boat, she told me about Mr. Simpkins buying his daughter a BMW automobile on her 16th birthday, and his purchase of a Cadillac. Often, Ms. Stoneking would speak about developments regarding Mr. Simpkins' divorce and remarriage. Ms. Stoneking discussed rumors about personal affairs among people associated with The Nashville Banner, and would often discuss decisions made in the Publisher's office, involving Banner business. Ms. Stoneking also discussed the personal business of Brownlee Currey, Chairman, and Mr. Simpkins' personal business. Ms. Stoneking talked about the stress of her job, and her fears and concerns about the job and its requirements. Ms. Stoneking also discussed the propriety of Mr. Simpkins' personal and business activities. Much of the information which I received during these conversations with Ms. Stoneking was not otherwise available to me. This relationship became familiar, and as comfortable to me. I did not seek this relationship but it was friendly and interesting. I never divulged the contents of our conversations, except an occasional mention to my husband.

5. Sometime early in 1989, Ms Stoneking told me that Mr. Gunter, my boss, the Executive Vice President, would be terminated. Ms. Stoneking told me not to reveal this information and I did not, not even to Mr Gunter. Sometime later, Ms. Stoneking told me that the plan had changed, and Mr. Gunter would not be terminated, but would be demoted with a five (5) year contract. Again, I made no disclosure of this information.

6. During the first week of March, 1989, Mr. Gunter called me to this office and told me that he was being reassigned, and that I would no longer be his secretary. I already knew that Mr. Gunter was being demoted or reassigned, but I pretended not to know. Effective March 6, 1989, I was reassigned as secretary to Imogene Stoneking, who was then Comptroller.

7. Immediately after my reassignment to Ms. Stoneking, she told me "you were almost let go." Ms. Stoneking explained that my termination had been discussed relative to Mr. Gunter's reassignment and/or demotion. I was shocked and devastated by this information since I had never felt insecure about my employment, because of my tenure and my performance record. This was the first time in my life that I felt that my job was in jeopardy, and I was very concerned. I believed that any idea to terminate me was not fair, given my record. I was anxious to know the reasons.

8. Since 1971, I had handled payroll functions for The Nashville Banner, and had complete access to the personnel records, including Mr. Gunter's records. After my assignment to Ms. Stoneking, my office was located on the third floor. The personnel files were contained in a filing cabinet in my office, to which I had full access on a daily basis, without any prohibition. After Ms. Stoneking's information regarding my job security, I opened Mr. Gunter's personnel file which was in the file cabinet in my office, to learn why there had been any consideration of my termination. Therein, I found a contract between Mr. Gunter and The Nashville Banner, changing his assignment and compensating him for the next five (5) years. Because I was concerned about my job, and the effect of Mr. Gunter's reassignment on my employment, I copied the contract and took it home to read. I read the contract and allowed my husband to read it, and never discussed it or showed it to another person. The only other person I shared the contract with was my lawyer, after litigation was commenced in this matter. Again, the contract was located in a file cabinet in my office, in Mr. Gunter's personnel record to which I had full access without prohibition. I had access to records of this nature, which were maintained in my offices for approximately 18 years.

9. After I was assigned to Ms. Stoneking, and after she informed me that any termination had been

considered, I began to experience certain changes in circumstance which began to increase my concern. Ms. Stoneking spoke often about the predicament of afternoon newspapers, and how their future was dim. On numerous occasions, Ms. Stoneking told me that Mr. Simpkins thought The Nashville Banner had too many secretaries. Ms. Stoneking indicated, in conversation and otherwise, that Mr. Simpkins was not pleased with the financial situation of The Nashville Banner. Ms. Stoneking began to discuss retirement. Ms. Stoneking used a Tennessean employee, Robert Jones, as an example. Mr. Jones was an older employee, and Ms. Stoneking would say that she did not understand "why these people don't retire". Ms. Stoneking would ask me "why don't they retire?" I recall her once saying "I hope I can get out at age 55."

10. Later in 1989, I began to experience changes at work, which I believed were calculated to make my job less comfortable. For example, my parking privileges were changed, and I was required to walk further. Seemingly trivial matters, such as whether or not I was physically located at my desk became important. Lunch hour privileges were changed, and weekend work was mentioned. I began to suspect a pattern calculated to separate me from my job.

11. In December, 1989, I was moved from the general administrative payroll to the newsroom payroll, although my job remained the same (secretary to the Comptroller). This status change seemed unnecessary and peculiar, since Ms. Stoneking reported directly to the Publisher. Soon thereafter, in either December, 1989 or January, 1990, Ms. Stoneking told me "you might as well know something, there are going to be staff reductions around here." I learned that the reduction would be made from the newsroom budget, not the general administrative payroll.

12. Sometime between January, 1990 and March,

1990, Ms. Stoneking gave me a stack of documents and directed that I shred them. My duties regularly involved shredding documents for Ms. Stoneking. Two shredding machines were available, a large one which shredded stacks of papers simultaneously was located in the payroll department on another floor, and a smaller one which allowed only the shredding of about two or three pages, was available in my work area. I was using the smaller machine, separating the documents, and shredding them two or three pages at a time, when I noticed figures regarding payroll and revenues. I was curious regarding these figures because I heard so much about The Nashville Banner's financial conditions from Ms. Stoneking. I copied approximately four pages, two regarding payroll and two regarding revenues, and placed them in a file cabinet in my office. My intent was to review these documents, in an attempt to learn information regarding my job security concerns.

13. In April, 1990, Ms. Stoneking told me that Mr. Simpkins had asked for a memo regarding my retirement plans. Ms. Stoneking then requested authority to contact The Nashville Banner's pension administrator and ascertain my retirement status. I had no desire to retire and no desire to inquire myself, but because of her position, I allowed Ms. Stoneking to make inquiry. Ms. Stoneking contacted the pension administrators and gave me a letter confirming her inquiry. Ms. Stoneking's inquiry and actions increased my anxieties, and I became most concerned. I removed the copied documents and took them home to discuss my situation with my husband. I believe I took them home during the end of April, 1990 or the first part of May, 1990. My purpose for removing the documents was to seek my husband's counsel. I felt the documents would assist us in reviewing our options regarding my obviously deteriorating job situation. By this time I knew I was being forced out. The retirement inquiry and other circumstances, led me to conclude that my age was a consideration. I wondered whether the "gloom and doom" economics of the

Banner were being offered as an excuse. I felt these documents would provide source information. I shared these documents and the information contained thereon with no one except my husband, until I provided them to my attorney after the litigation commenced.

FURTHER AFFIANT SAITH NOT.

S/S

CHRISTINE MCKENNON

[Caption Omitted]

NOTICE OF FILING DOCUMENTS

Plaintiff gives notice that the following documents have been filed to supplement response to defendant's motion for summary judgment:

1. Selected excerpts from the deposition of Christine McKennon; (December 17 and 18, 1991);
2. Selected excerpts from the deposition of Irby C. Simpkins, Jr.; (March 6, 1992);
3. Selected excerpts from the deposition of Elise David McMillian; (March 9, 1992);
4. Selected excerpts from the deposition of Imogene Stoneking;
5. A copy of a letter dated April 24, 1990, from Vickie N. Williams to Imogene Stoneking; (Exhibit 1 to Christine McKennon Affidavit).

Respectfully submitted,

[Caption Omitted]

*SELECTED EXCERPTS FROM THE DEPOSITION**OF IRBY C. SIMPKINS, JR.**DEPOSITION DATES - MARCH 6, 1992*

[5] IRBY SIMPKINS, JR., having been first duly sworn, was examined and deposed as follows:

DIRECT EXAMINATION BY MR. TERRY:

Q. Mr. Simpkins, have you given a deposition before?

A. I have.

Q. So you know what depositions are about.

A. Yes, sir, I do.

Q. I represent Christine McKennon. You are the Publisher of the Nashville Banner; is that correct?

A. That is correct.

Q. How long have you been Publisher?

A. Since 1981.

Q. How is the Nashville Banner organized; is it a corporation?

A. It is a Subchapter S Corporation.

Q. And who holds stock in that corporation?

A. It is owned by two [6] shareholders, each of them owning 50 percent; Brownlee Currey and myself.

Q. And does Mr. Currey hold an office at the Nashville Banner?

A. Yes. He is Chairman of the Board.

Q. And your title is Publisher; is that correct?

A. And President.

Q. Would you take this pad and paper and this pen, or your pen, and draw an organizational chart of the Nashville Banner, as it existed in October of 1990?

A. Yes, I will. That would be the rest of the newspaper, would be reporting to Mr. Jones.

Q. Well, you have indicated on what will be Exhibit 7, "I.C.S." Is that you?

A. Yes, it is.

Q. And you are the Publisher; correct?

A. Um-hum (affirmative response.)

Q. And Mr. Currey is the Chairman?

A. Chairman.

Q. And Mr. Jones was then what?

[12] A. To publish a daily newspaper in Nashville, Tennessee.

Q. What is the name of the daily newspaper?

A. Nashville Banner.

Q. Are you a resident of Middle Tennessee?

A. I am.

Q. And where do you reside; what county?

A. Davidson County.

Q. How many persons does the Nashville Banner Publishing Company employ?

A. I do not know the number.

MR. WAYLAND: Are you talking about presently?

MR. TERRY: Yes.

THE WITNESS: I do not know.

BY MR. TERRY:

Q. Does the Nashville Banner Publishing Company employ more than 30 persons?

A. Yes.

Q. Did the Nashville Banner Publishing Company employ more than 30 persons on October 31, 1990?

[25] McKennon fired?

MR. WAYLAND: I am going to object to the characterization of the term fired.

BY MR. TERRY:

Q. Mr. Simpkins, why was Ms. McKennon fired?

A. Why was she fired? Because of a declining economic circumstance of the newspaper.

Q. And what was that declining economic circumstance?

A. Reduced revenue.

Q. And I would like to understand the reduced revenue picture that you have now articulated as the reason for my client being terminated. I don't know how far back I need to go, but maybe you could help me by telling me when the revenues of the Nashville Banner began to decline.

MR. TERRY: Let the record reflect that the witness is consulting with Counsel.

THE WITNESS: Would you please repeat

the question.

...

[82] those employees who survive.

And that's -- you know, that's, frankly, the toughest part of running a company is when you are faced with that.

Q. Do you perceive yourself as running a company that is going broke?

A. I haven't gotten the jury in on that yet, Mr. Terry.

Q. Do you value tenure in your employees?

A. Oh, absolutely.

Q. You think that is an important thing?

A. Absolutely.

Q. You know Ms. McKennon was there for 30 some years.

A. I do. And I value every one of those years she was there.

Q. And have you ever had an opportunity to review her personnel file?

A. Not to my knowledge.

Q. If over those years she was favorably evaluated, would you value that?

A. Oh, absolutely.

Q. By other people, other than [83] you, before you were there?

A. Sure. I would tell you this, is that our personnel evaluation system we use at the Banner has got a lot more heart and compassion and substance in it. We are

in a very intense business, Mr. Terry. Kind of like practicing law, you know.

And we get really next to each other in our business, because we are under so much pressure all the time.

And so I doubt that there are very many bad personnel evaluations ever been written. I am not sure I have ever written one since I have been at the Banner, if the truth be known.

But you need to know that I, from my interface position, I thought Chris McKennon was a nice person. And I enjoyed the interface that I had with her.

Q. Did you have an opinion on her performance?

A. Not really directly. Chris had kind of moved laterally. Any impressions I would have had would have been secondhand, because I never worked with her directly.

[84] Q. Do you have any impressions of complaints about her work?

A. Yes, I do.

Q. What type of impression?

A. That her performance, as the pressure of the work grew from the time she moved from working with Jack, which was basically kind of busy work in many circumstances, to real high pressure, that was working for Imogene, my general impression is that was a challenge.

Q. Has Mrs. Stoneking ever complained to you about Ms. McKennon's performance?

A. Well, I would say that Imogene would be more likely, maybe, to be protective than a complainer. If you knew Imogene very well, you would know that she would think it was her responsibility to see that Chris was doing a good job.

Q. So, you don't have any recollection of complaints by Mrs. Stoneking?

A. Not in those terms, no.

Q. What would be the process? And we are not talking about economic-related

[88] for them not meeting the standard as an employee, yes, he would come and talk to me about that before firing them.

Now, if I were out of town and he needed to summarily take action, he has the authority to do that. But I am not sure that has ever happened.

Q. What would be an example of having to summarily --

A. Oh, a reporter who had, really, malconduct. Violated a confidence; shared newspaper documents with somebody else; stolen newspaper property. Something like that. Really serious offenses.

Q. Now, you know you signed this Affidavit, saying that you would have terminated Ms. McKennon for talking a couple of pieces of paper and copying them and keeping them in her desk. You remember that?

MR. WAYLAND: I am going to object to the question and the characterization. It assumes a fact not in evidence. The Affidavit doesn't say anything about Ms. McKennon keeping paper in her desk.

In fact, her testimony was, and [89] what come out of this, is it came out in her deposition that she had surreptitiously, without authorization, copied company documents and taken them home with her.

BY MR. TERRY:

Q. Let me show you your Affidavit, Mr.

Simpkins. It is Exhibit Number 2.

MR. WAYLAND: And not just copy of documents, confidential documents.

THE WITNESS: All right, sir.

BY MR. TERRY:

Q. Are you familiar with that Affidavit?

A. Yes.

Q. I think I have another copy, actually.

MR. WAYLAND: Excuse me. (Mr. Wayland consulting with Deponent.)

BY MR. TERRY:

Q. Have you got another copy? I think your lawyer had a copy for you. Did you have a copy?

MR. WAYLAND: My name is Eddie Wayland. I am his lawyer. No, I didn't make a copy for him, Mr. Terry. I will

[95] budgeted, that they were going to be distributing to us as revenue.

Q. So, that is what you anticipated?

A. Yes.

Q. And the second column is what you received?

A. That's correct.

MR. WAYLAND: Is that the collective exhibit?

MR. TERRY: Yes. (Off the record discussion.)

BY MR. TERRY:

Q. Now, we are looking at Exhibit 2, Mr. Simpkins, your Affidavit and the attached letter, dated December 20, 1991. Mr. Simpkins, who drafted this letter?

A. I did, in consultation with consultants.

Q. Did you consult with your lawyer in drafting the letter?

A. He was one of them, yes.

Q. Did Mr. Wayland provide you with a draft?

MR. WAYLAND: I am going to [96] object, to the extent that calls for attorney/client communications. That is absolutely irrelevant.

MR. TERRY: Is that a yes?

MR. WAYLAND: It is an objection. I am instructing the witness not to answer.

BY MR. TERRY:

Q. Did you draft the Affidavit?

A. No, sir.

Q. Do you know who drafted the Affidavit?

A. I do not.

Q. Do you know when you first saw the Affidavit?

A. I do not know when I first saw it.

Q. Well, it bears a notary seal for December 20, 1991. If you signed it that day, is it probably the day that you first saw it?

A. I don't know.

Q. Do you have any recollection of the signing of

this Affidavit?

A. No. I mean, I know I signed [97] it, but I don't have any recollection of when or where I was or what was going on when I signed it.

Q. Do you understand the purpose in signing this Affidavit?

A. I do.

Q. What was it?

A. The purpose in signing this is to tell whoever affidavits go to -- I guess Judge Higgins -- that I considered Chris's action, that she had testified to, to be a grievous action on her part.

And that if she had been employed by the company when I found out about this, she would have been terminated.

Q. Throughout the Affidavit and letter, the word misconduct is used.

A. Yes.

Q. What misconduct did she commit?

A. First of all, let me -- okay. I am going to refer to paragraph four of the Affidavit, where I state that she -- "her actions constituted obvious and deliberate misconduct, including breach of trust and confidentiality obligations."

[98] And both of those are obvious and deliberate misconduct.

Q. All right. But specifically, what did she do that was wrongful conduct?

A. She testified that she copied and removed from the company's premises, proprietary and confidential documents and information that she had access to by virtue of her employment. She was not authorized to copy or steal

those documents.

And that she did not advise me or seek consent for that action on her part. And that she admitted in testimony, I am advised, that she did not advise any other officer or manager of the company, or seek their consent for her actions.

Q. What documents did she copy and remove?

I just want the record to reflect what Mr. Simpkins is referring to the Affidavit to answer each of his questions.

MR. WAYLAND: You are asking him questions about the Affidavit, Counsel. He said he wanted a copy to look at them. I resent any implications in your reference to [99] the record.

BY MR. TERRY:

Q. Despite Mr. Wayland's resentment, I would like the record to reflect that Mr. Simpkins is referring to the Affidavit, in answering the question, which is simply the truth.

What documents did she copy and remove?

A. My knowledge is Ms. McKennon's testimony. I don't have -- I think there was one document that was a general ledger; maybe Jack Gunter's retirement contract. I am not sure what other documents were stolen.

Q. What is your recollection -- how many pages was the general ledger?

A. I do not know.

Q. What was on it?

A. The entries, the one I remember in particular, was an entry to Brownlee O. Currey.

Q. What kind of entry?

A. Dollars that had been paid to him.

Q. Payroll information?

[100] A. I don't know whether it was payroll or not.

Q. Do you know when she took it? Do you know when she took the general ledger document?

A. No.

Q. Do you know when she copied it?

A. My knowledge is limited to her testimony. I don't think she testified with regard -- I am sorry. I don't know when she took them. I don't know when she copied them.

Q. And you don't know when she removed them from the company's property?

A. I only know what she testified to.

Q. But you weren't present for her testimony were you?

A. No, I read it.

Q. You read it?

A. Um-hum (affirmative response.)

Q. And do you know when you read it?

A. I am not sure of the exact date, no.

Q. Would it have been before you [101] signed this Affidavit?

A. Yes.

Q. So, it would be your testimony that you had a copy of her deposition on or before December 20, 1991?

A. Well, let me see. I think, Mr. Terry, that what I had was knowledge of the misconduct, from the testimony.

Q. Right.

A. And I subsequently read the testimony.

Q. Okay. So, when you signed the Affidavit, you probably had information that was given to you by either Mr. Wayland or Ms. McMillan.

A. Probably, yes.

Q. And you say that as far as the documents -- the involve documents, you think there was a general ledger sheet. You don't know how lengthy it was.

A. I do not.

Q. And you think that it had something to do with { }'s retirement package?

A. No, those are separate [102] documents.

Q. Right.

A. Which was, my understanding, copied from { }'s retirement contract.

Q. Okay.

A. I am sorry. I misclassified that. Employment contract is what I should have said.

Q. I don't know. You might have been right the first time.

A. I don't know. I believe I am right. He is still an employee of the company. I think I am right.

Q. Mr. Simpkins, aren't the details important as to exactly what she took and exactly when she copied them, and exactly when she removed anything that was copied?

A. Mr. Terry, we are in a highly confidential business. It is known throughout our company that one of the most important traits among our employees is honesty, beyond a narrow definition. It needs to be a definition of

being forthrightly honest.

And any action of any employee at the Nashville Banner, that even smelled of

* * *

[105] an opportunity to come discuss her fears with me. She never did that.

I have absolutely no pity for an employee who uses fear, undiscussed, as an excuse for theft and dishonesty.

Q. The dishonesty, Mr. Simpkins, was what, again? What was dishonest about what is alleged?

A. She took information that was confidential in the newspaper, which is a dishonest act.

Q. She took it where?

A. She took it home, she testified.

Q. Well, and what is dishonest about that?

A. She was not authorized to have that information at home.

Q. It was unauthorized?

A. Yes. So that is dishonest.

Q. Okay.

A. I mean, if the Judge tells you you have got to do something, and you just say -- you do it by omission or commission, you are a dishonest lawyer because you have not done [106] what you agreed with the Judge you would do.

She was a dishonest employee. She had agreed to handle confidential information on behalf of the company, and she didn't do that honestly. She took part of that for her own personal use, to hold for her own gain whenever she thought she might need it or it might come in

handy or for insurance. That is clearly dishonest.

Q. And you are certain that no matter what she had explained to you, had you talked to her, and given the fact that she had 30 years with the company, and given the fact that she was afraid of losing her job, that the only action you would have taken was termination?

MR. WAYLAND: Objection, to the extent the question is totally hypothetical, and further assumes facts not in evidence. And finally, because it is a compound question. You can answer, Irby. I just wanted that objection on the record.

THE WITNESS: I would have been perfectly open to Chris coming to my office and sitting down and discussing any kind of [107] unhappiness, unpleasantness, or other problems she had with regard to her job.

BY MR. TERRY:

Q. No, I am asking you -- let's you assume this. Let's assume that Mrs. Stoneking had come to you.

A. Um-hum (affirmative response.)

Q. And Ms. McKennon was still working there; okay? Ms. McKennon was still working there. And Mrs. Stoneking came to you and said, I found this general ledger form in Chris McKennon's desk. She had it in her desk. What would you have done at that point --

MR. WAYLAND: I want to object to the question, to the extent --

BY MR. TERRY:

Q. -- if she was still working there?

MR. WAYLAND: as a hypothetical question.

THE WITNESS: I would have terminated her.

BY MR. TERRY:

Q. For having the general ledger report in her desk?

[108] A. Yes. That is clearly a dishonest act and misconduct.

Q. Do you know that she has access to the general ledger?

A. Sure.

Q. So you would have terminated her for copying something that she had access to?

A. Yes. She has no authority to copy that, unless she is instructed to by her supervisor.

Q. And the fact that she had worked there 36 years, and the fact that she had copied that because she was, whether rightfully or wrongfully, concerned about losing that job, your only action would have been to terminate her?

A. You know, actually, I would have terminated her faster because of the 36 years. Because she knows -- she knows better that a person that has been there six months, that is an absolute violation of the confidentiality of her job.

Q. Can you show -- when you say it is a violation of confidentiality --

[109] A. Um-hum (affirmative response.)

Q. -- where is the violation of confidentiality? How has confidentiality been violated?

A. Because any time that you copy information which is confidential to the company, you open up opportunities for somebody else to see it, or for it to be used in a manner that is negative to the purposes of her job.

Q. So, there is an agreement -- I mean there is an opportunity --

A. Obligation.

Q. There is an opportunity to violate confidentiality, but there is no violation of confidentiality here; is there?

A. Well, sure, it was a violation of confidentiality.

Q. Are you saying that Ms. McKennon didn't know this information, anyway?

A. She was not a party to { }'s retirement contract, or to the amount of money that { } was being paid out of the company. That was confidential information.

[110] Q. Do you know of any other instance where someone has been summarily terminated by your company for any misconduct, whatsoever, in the last five years?

A. Not in the last five years.

Q. Do you have any procedure for suspension or probation from employment at your company?

A. No.

Q. Is there any reprimand short of termination?

A. Oh, sure. But not for the kinds of misconduct that are in these documents.

Q. What type of employee action would be -- have you employed, short of termination?

MR. WAYLAND: Under what circumstances?

BY MR. TERRY:

Q. Any circumstances.

A. We have had employees who were not doing their job, who are not writing, taking pictures, with the competency that they should; or who had bad attitude problems; who [111] were consistently lacking in

productivity.

I mean, fairly standard kinds of issues that you have to deal with. Employees who need supervision and management to improve themselves.

BY MR. TERRY:

Q. And what type of action have you taken with these employees, short of termination?

A. Suspension of wage increases, supervisor sitting down with them and spending a good deal of time explaining to them that if they don't straighten up, termination will follow.

Q. Do you know of any harm that has accrued to your company, as a result of Ms. McKennon copying these documents and taking them home?

A. Well, I am not sure how those -- I am not sure how stealing those documents relates to this lawsuit. But this lawsuit is a lot of harm to my company.

Q. How is that?

A. It takes up a lot of time and it costs a lot of money.

[Caption Omitted]

*SELECTED EXCERPTS FROM THE DEPOSITION
OF ELISE DAVID MCMILLAN*

DEPOSITION DATES - MARCH 9, 1992

[5] ELISE McMILLAN, having been first duly sworn, was examined and deposed as follows:

DIRECT EXAMINATION

BY MR. TERRY:

Q. State your full name.

A. Elise David McMillan.

Q. Ms. McMillan, have you given a deposition before?

A. Yes.

Q. I know you are familiar with them, so I won't explain this deposition to you. But I will say, if you need to stop and consult with Mr. Wayland, please feel free to. Or if you want to take a break. And I don't think this deposition will take very long.

A. Okay.

Q. What is your current position?

A. My current position at the Banner is Executive Vice-President for Administration and General Counsel.

Q. How long have you held that position?

A. Since 1988.

MR. WAYLAND: Mr. Terry, before you go any further, as Ms. McMillan said, since '88 she [6] has been Vice-President and General Counsel of the Nashville Banner, such that certain of her duties and day-to-day responsibilities fall within the realm of being an in-house

counsel, in which she is functioning as an attorney for the company, and in her capacity as general counsel. And other of her duties fall within more of an administrative realm and role that aren't really contingent upon the fact that she is an attorney.

Ms McMillan is here. She wears both hats today. She wore both hats prior to today; she wore both hats for the period of time that are relevant for the purposes of this lawsuit. That we are agreeing to have Ms. McMillan testify, and agreeing, to the extent that we can, consistent with the attorney/client privilege or attorney work product privilege, to have her testify.

And we are just saying, for the record, she is in dual capacity. And it is our understanding, based upon our research of the applicable case law, that by permitting her to [7] testify as to those matters which would not fall within her realm as being General Counsel, or in the role as an attorney for the Company, that that doesn't waive the right to claim privilege in appropriate context, when and if your inquiring directs itself to those areas that Ms. McMillan was acting in a capacity as an attorney and General Counsel.

And with that statement of our understanding, we are prepared to go forward. I just wanted to put that on the record at the outset, so that you would know our position.

BY MR. TERRY:

Q. Ms. McMillan, how were you employed by the Banner, initially?

A. The very first, when I first started working for the Nashville Banner?

Q. Un-hum (affirmative response.)

A. I started in 1978, as a reporter.

Q. All right. And when did you -- did you have

a law degree then?

A. No, I did not.

Q. When did you obtain a law degree?

* * *

[15] termination?

A. I don't remember.

Q. Were you asked to prepare any written memorandum, expressing a legal opinion on these terminations?

A. No.

Q. Were you asked to consult with outside counsel, regarding these terminations?

MR. WAYLAND: I want to object to the question, to the extent that calls for attorney/client communications, because to the extent --

MR. TERRY: I asked her what she did. There is no attorney/client communication. I just asked her what she did.

MR. WAYLAND: You asked her what she was asked to consult. If she answers that yes or no, it communicates to you what the communication was.

MR. TERRY: Well, all right.

Q. After that meeting, did you consult with outside counsel, regarding these terminations?

MR. WAYLAND: I am going to object to the question, to the extent that you [16] put regarding on there.

BY MR. TERRY:

Q. After that meeting, did you consult with

outside counsel?

A. Yes.

Q. Did you consult with Mr. Wayland?

A. Yes.

Q. And what did you consult with Mr. Wayland about?

MR. WAYLAND: Objection, to the extent that it calls for attorney/client communications.

BY MR. TERRY:

Q. Did you -- after consulting with Mr. Wayland, did you receive any document from Mr. Wayland, expressing a legal opinion regarding the terminations?

MR. WAYLAND: Objection, to the extent that it calls for attorney/client communications.

MR. TERRY: And I assume you are instructing her not to answer.

MR. WAYLAND: Yes, sir, I am instructing her to not answer. If you are [17] going to push --

MR. TERRY: I am not waiving this attorney-client privilege issue. But I know we are not going to resolve it today. I just want to get the questions on the record.

MR. WAYLAND: Also, just -- well, since you are putting it on the record, let me say, to the extent that there were communications between Ms. McMillan and myself, they may also implicate work product privilege.

BY MR. TERRY:

Q. Did your discussions with Mr. Wayland relate to Christine McKennon?

MR. WAYLAND: Objection, to the extent it

calls for attorney/client privilege and/or work product. Direct the witness not to answer.

I also object to the relevancy of the question. You've not shown relevancy to anything about these communications, Mr. Terry, because the witness has testified that she didn't even find out about the list, until after the decision had been made. So, I put a relevancy objection on top of all of the ones that I made so far.

[18] BY MR. TERRY:

Q. When you met with Mr. Simpkins and Mr. Jones, did you understand that your legal opinion could affect the terminations, one way or another?

MR. TERRY: Let the record reflect that she is consult willing with her Counsel.

A. Will you ask that question one more time?

Q. When you met with Mr. Simpkins and Mr. Jones, did you understand that your legal opinion could affect the terminations, one way or another?

A. No. When I got that list, it was my understanding that was a final decision.

Q. When you -- have you attended any seminars or courses on employment discrimination?

A. On employment discrimination?

Q. Yes.

A. I have attended King and Ballow's "In Search of Management Rights" seminar. And that would be about it.

Q. All right. Have you directed [19] Imogene Stoneking to attend any seminars or courses, regarding employment discrimination?

MR. WAYLAND: Did you say has she

directed Mrs. Stoneking to attend?

MR. TERRY: Yes.

A. Not that I recall.

Q. Has she, to your knowledge attended any seminars on employment discrimination?

A. Not that I recall. But, you know, she doesn't work for me, so she may have and I wouldn't know it.

Q. Was she present at any seminar or course put on by King and Ballow, that you attended?

A. I don't recall. She may have gone to one of the "In Search of Management Rights", but I don't remember if she did or not.

Q. What is the name of that course?

Q. "In Search of Management Rights".

Q. Did you consult with M. Jones, as a non-lawyer, as -- well, is it Executive

* * *

[34] Q. Okay. Do you have any knowledge, whatsoever, of anybody at the Nashville Banner encouraging Ms. McKennon to retire, before October 31, 1990?

A. No.

Q. Have you ever heard a discussion of Ms. McKennon's retirement, by anybody at the Nashville Banner?

A. I do recall one time, and it was in -- when we were doing salary reviews, which would have been the Spring of 1990. We were going through the reviews, and I remember that Irby Simpkins asked what Chris's retirement plans were. And Imogene was supposed to get back with that information to Irby.

And that is the last I really -- that's the only discussion I would have heard.

Q. It was in the Spring of '90; is that right?

A. (Witness nods in the affirmative.)

MR. WAYLAND: Mrs. McMillan, you have to articulate your answer. You are [35] shaking your head.

THE WITNESS: Yes.

BY MR. TERRY:

Q. Where does that discussion occur?

A. I believe it would have been in our old executive conference room, in the Banner offices.

Q. Who was present?

A. I can tell you that, normally, in a salary review session, I would be present, Imogene Stoneking, Irby Simpkins, and Eddie Jones.

MR. WAYLAND: Ms. McMillan, the question was who was present at that meeting. You either know who was there or you don't. You said normally who would be there. Were those individuals all there at the meeting?

THE WITNESS: I can't -- I don't know.

BY MR. TERRY:

Q. Normally, those people would have been there; is that correct?

A. Yes.

Q. Do you recall -- this question by Mr. Simpkins, regarding Ms. McKennon's retirement [36] plans, was directed to whom?

A. It would have been directed to Imogene

Stoneking.

Q. All right. And do you recall what would have caused or occasioned a question regarding Ms. McKennon's retirement plans?

A. Yes.

Q. Do you recall Ms. Stoneking's response?

A. No, I don't.

Q. Do you recall any other details about that conversation?

A. No.

Q. Are there minutes kept of those meetings?

A. Yes.

Q. If that meeting occurred in the Spring of 1990, do you have any specific recollection of anything else involving Ms. McKennon's termination or retirement, until that meeting that you discussed that occurred in October, when you are advised of the general list?

A. No, I don't.

[37] Q. So you have, so to speak, a void of knowledge, basically, at that point. You don't have any -- your weren't in any meetings about who is going to be terminated; who is going to be laid off, or anything like that. Is that right.

MR. WAYLAND: I am going to object to the characterization of void of knowledge, Counsel. The mere fact that something you might have wished happened, would have happened, doesn't constitute a void of knowledge. The witness has testified she was involved in no other conversations.

MR. TERRY: I certainly don't want to negatively want to characterize that. I am trying to get through that period of time, without going day by day. I'm

trying to --

MR. WAYLAND: Why don't you ask her if after that date she was involved in any other meetings involving that topic.

BY MR. TERRY:

Q. I accept that, and ask you to answer that.

A. No, I was not.

Q. Your recollection, with regard

* * *

that we might be working with -- that Chris would be let go, and that we might be working with Ann Manning.

But beyond that, I don't have any specific recollection. I think I was more focused on, you know, getting the things prepared.

Q. Did Mr. Jones ever ask your input, any information from you, regarding the performance of Chris McKennon?

A. At what point?

Q. Anytime in 1990. Well, let me qualify that. Let's say between August and October.

A. Like I explained to you before, the way Eddie Jones manages is to ask how people are doing. He may have talked about Chris, in relation to the preparation of the salary review or budgets. I don't remember, specifically, if he did or not.

Q. Would that have been in April?

A. Could have been, but I just don't remember when it would have been.

Q. Did Mr. Simpkins ever ask your opinion or ask for any information from you, regarding the performance

of Ms. McKennon?

A. I don't recall anything.

MR. TERRY: Let's take a short recess here. I may be finished. (Whereupon, a short recess was held.)

MR. TERRY: I don't have any more questions. Thank you.

[Caption Omitted]

*SELECTED EXCERPTS FROM THE DEPOSITION
OF IMOGENE STONEKING*

DEPOSITION DATES - MARCH 6, 1992

* * *

[47] that. And you have never contacted us, by coming up and looking through the documents that we had available, and we have indicated our willingness to make available for your inspection, pursuant to your document request.

BY MR. TERRY:

Q. Okay. Mrs. Stoneking, are you aware that since we convened here in December, and I started taking your deposition, that the Nashville Banner has now taken the position that Christine McKennon could have been fired because she took documents that you gave her? Are you aware of that?

A. Yes.

Q. And how did you become aware of that?

A. I signed one of the Affidavits.

Q. What Affidavit?

A. That said had I -- as I recall, the Affidavit indicated that had I known she had taken documents, that she would have been fired.

Q. That she could have been fired?

A. On the spot.

Q. Okay.

[48] A. Which I would have recommended to Mr. Simpkins to do.

Q. Who prepared that Affidavit for you?

A. I don't know.

Q. You don't know?

A. No.

Q. When did you first see that Affidavit?

A. I don't recall the date.

Q. Well, do you recall who brought it to you?

A. As I recall, Elise McMillan.

Q. Let me show you a document that is marked "Affidavit of Imogene Stoneking". It bears your signature on page two. And it is notarized on December 23, 1991. See if you can identify this document as your Affidavit.

A. Yes.

Q. You state in paragraph three -

MR. WAYLAND: Excuse me, if you are going to ask the witness questions about the Affidavit, I would request that she be permitted to see a copy of it.

MR. TERRY: Here is a copy.

* * *

EXHIBIT

ACTUARIES AND CONSULTANTS
 BRYAN, PENDLETON, SWATZ & McALLISTER
 ONE BURTON HILLS BOULEVARD
 SUITE 275
 POST OFFICE BOX 150949
 NASHVILLE, TENNESSEE 37215
 TELEPHONE (615) 665-1640

April 24, 1990

Ms. Imogene Stoneking
 Comptroller
 Nashville Banner Publishing Company
 1100 Broadway
 Nashville, Tennessee 37202

Dear Imogene:

Re: Nashville Banner Publishing Company
 Pension Plan

As you requested, we have prepared a benefit application for Ms. Christine McKennon. If Ms. McKennon does retire, her benefit application must be revised to show the amounts payable in the form of joint and survivor annuities. To calculate these amounts, we would need her husband's date of birth. If you have any questions about the enclosed document, please feel free to call me.

Sincerely,

s/s
 Vickie N. Williams, F.S.A.

Enclosure

[Caption Omitted]

REPLY TO PLAINTIFF'S RESPONSE
 TO DEFENDANT'S MOTION FOR
 SUMMARY JUDGMENT

INTRODUCTION

Plaintiff's Response to Defendant's Motion for Summary Judgment ("Motion") raises grave concerns about abuse of the judicial process. Faced with this dispositive Motion, Plaintiff has attempted to defeat it by altering her sworn testimony in a March 13, 1992, affidavit that, in several material ways, contradicts her December, 1991, deposition testimony. In addition, Plaintiff's affidavit alters her prior testimony by adding wholly new purported factual information in an apparent effort to create disputed facts.

Notwithstanding these thirteenth hour efforts to manufacture disputed facts, Plaintiff, even after an extension of time to conduct additional discovery,¹ does not deny the facts that make the Company's Motion meritorious as a matter of law. Although she belatedly attempts to justify her wrongdoing, Plaintiff admits that she surreptitiously copied and took confidential, proprietary Company documents from the premises, that she was not authorized to do this, and that she shared these purloined documents with her husband. Based on these undisputed facts and on the clear

¹ Plaintiff unilaterally obtained a 48-day extension of time to respond to the Company's Motion, ostensibly to enable Plaintiff adequately to prepare a response. It is telling that, after taking the depositions of four of the Company's principals during this extension, Plaintiff relied on none of this testimony to refute the factual basis for the Company's Motion. Indeed, the deposition testimony simply reaffirmed the seriousness of Plaintiff's misconduct.

law of the Sixth Circuit² as well as other Circuits, Plaintiff cannot defeat the Company's Motion for Summary Judgment based on the after-acquired evidence of her admitted misconduct.

ARGUMENT

I. PLAINTIFF'S ATTEMPT TO SUBMIT A REVISED VERSION OF THE TRUTH FAILS TO CREATE GENUINE ISSUES OF FACT

The Company's Motion is based primarily upon Plaintiff's own December 17 and 18, 1991, deposition testimony. In an effort to circumvent this, Plaintiff has submitted an affidavit, dated March 13, 1992, attempting to defeat the Company's Motion by creating purported issues of material fact where none exists. Plaintiff's affidavit was prepared three days before her Response was filed and is carefully crafted and orchestrated to support the arguments raised in her Response. The affidavit is obviously self-serving. Indeed, Plaintiff does not refer to *any* proof other than the affidavit, obviously tailored specifically for the Response.³ Thus, faced with a dispositive motion, Plaintiff submits an affidavit that contradicts her own unequivocal deposition testimony taken in December, 1991, at a time when she was not faced with the prospect of having her case dismissed.

² See *Johnson v. Honeywell Information systems, Inc.*, 57 F.E.P. Cases 1362 (6th Cir. 1992), discussed in and attached to the Company's Supplemental Authority in Support of Defendant's Motion for Summary Judgment.

³ Plaintiff does not once cite to the record in the Statement of Facts portion of her Response and cites only twice to her affidavit in her Statement of Disputed Material Facts. Consequently, the Company and the Court are left to wonder about the source of virtually all of Plaintiff's alleged factual information.

For example, Plaintiff has attempted to change dates concerning the surreptitious copying and taking of the Company's payroll ledger and profit and loss statement. In Plaintiff's affidavit, she states that these highly confidential documents were copied after January, 1990, and removed from the Company's premises in April or May, 1990. (Plaintiff's Affidavit, ¶¶ 12, 13). However, in her deposition, Plaintiff was unequivocal in her testimony that she copied and removed these documents from the Company's premises in September or October, 1989. Significantly, in her deposition she made no mention of other dates when the documents were copied or later taken home as she now denies in your affidavit. In reference to copying and taking the Company's payroll ledger, Plaintiff testified:

Q. You made a copy of it from the original?

A. It's a copy, yes.

Q. You made the copy?

A. Yes.

Q. When did you made this copy?

A. There again, I have no specific date except it's got to be in the fall sometime in September, October of 1989.

Q. So you made this copy sometime in September or October of 1989; is that correct?

A. Right.

Q. And you took it home?

A. I took it home.

Q. You did it in September of 1989?

A. Approximately the fall in September or

October.

(See Exhibit A attached hereto). Plaintiff testified similarly with regard to copying and taking the profit and loss statement in October or November, 1989. (See Exhibit B attached hereto).

Second, Plaintiff states in Paragraph 4 of her Statement of Disputed Facts that she "copied only the contract" relating to the Company manager. However, in Plaintiff's deposition, she admitted copying and taking other confidential documents from the manager's personnel file as well, *i.e.*, handwritten notes of the Company's General Counsel and two memoranda concerning this manager.⁴ In regard to these other documents, Plaintiff testified:

Q. You took all of those documents out of [the manager's] personnel file?

A. That's correct.

Q. And you made a copy of it?

A. That's correct.

(See Exhibit C attached hereto). Noticeably absent from her affidavit is any mention of these other confidential documents that she surreptitiously photocopied and removed from the Company's premises. Indeed, her affidavit conflicts outright with her deposition.

Third, Plaintiff states in her affidavit that she was told by the Company Comptroller, Ms. Stoneking, that a Company manager, Mr. Gunter, would be demoted. (Plaintiff's affidavit, ¶¶ 5, 6). This statement is a stunning contradiction to Plaintiff's deposition testimony where, after extensive questioning, she stated flatly that "I don't know of

⁴ For the Court's convenience, these other documents are attached as Collective Appendix H to Defendant's Statement of Undisputed Facts.

anybody specifically telling me." (See Exhibit D attached hereto). This is a prime example of the numerous contradictions created by Plaintiff's effort to revise her prior sworn testimony.

Despite extensive discovery, Plaintiff does not reference *any* proof in her Response, save her own self-serving affidavit. This affidavit materially contradicts her original sworn deposition testimony, upon which the Company's Motion is based.⁵ The affidavit should be seen for what it really is, an after-the-fact fabrication. Moreover, in her entire twenty-six page Response, Plaintiff does not cite the Court to one shred of evidence to refute the Company's proof that Plaintiff surreptitiously photocopied confidential business information and then removed this

⁵ After filing the affidavit with the Court and after the discovery cutoff date, Plaintiff tendered fifty pages of changes to her deposition. Defendant's counsel received these changes on March 19, 1992, 73 days after Plaintiff received the deposition. A preliminary review indicates that almost all of the more than 160 attempted changes are substantive reversals of prior testimony. For example, over a dozen of these attempted changes conveniently transform "yes" to "no" or vice versa. The court reporter stated that in 17 years of reporting she had never seen "such voluminous corrections by a witness, much less 50 pages worth." (See Exhibit E, letter from court reporter, attached hereto).

At this point, the Company will not address with the court the propriety of Plaintiff's attempted sabotage of the judicial process. Because the errata were submitted out of time and because plaintiff has failed in other ways to comply with Federal Rules of Civil Procedure 30(e), the matter is not yet ripe for a judicial determination under Rules 32(d)(4), 11, or 37. *See Combs v. Rockwell Int'l Corp.*, 927 F.2d 486 (9th Cir. 1991).

90a

information from the premises. Instead, Plaintiff simply seeks to justify her admitted misconduct.

In short, Plaintiff's attempt to submit a revised version of the truth fails to create genuine issues of fact. Additionally, Plaintiff's Response raises grave concerns about the length to which she is willing to go to salvage her cause of action.

91a

Exhibit E

HAND DELIVERED

March 19, 1992

Mr. R. Eddie Wayland
Attorney at Law
200 Fourth Avenue, North
1200 Noel Place
Nashville, TN 37219

In re: Christine McKennon vs. The Nashville
Banner Publishing Company

Dear Mr. Wayland:

Attached is a folder with enclosed errata pages that was hand delivered to me by Ms. McKennon yesterday, March 18, 1992 pertaining to Vol. I of her deposition, which was hand delivered to your office and Mr. Terry's office on December 31, 1991, and pertaining to Vol II of her deposition, which was hand delivered to your office and Mr. Terry's office on January 6, 1992. Attached to the errata pages is a copy of a letter to me from Ms. McKennon, which is self-explanatory. You will note that the 50 sheets of errata pages have not been executed by Ms. McKennon, nor her signature notarized.

I feel I must point out in my 17 years of reporting, I have taken countless depositions of experts, physicians, and lay persons where the signature was not waived by the witness and have never in my career had such voluminous corrections made by a witness, much less 50 pages worth.

92a

If I can be of any further assistance in this matter,
please do not hesitate to call me.

Yours very truly,

Teri A. Campbell

cc: Mr. Michael E. Terry

93a

[Caption Omitted]

**MOTION TO SUPPRESS
REVISIONS OF PLAINTIFF'S DEPOSITION**

Defendant, The Nashville Banner Publishing Co. ("the Company") moves to suppress the attempted revisions by Plaintiff to her deposition, pursuant to Federal Rules of Civil Procedure 30 and 32, and the Court's inherent power. As more fully set forth in the accompanying memorandum of law, the grounds for this motion to suppress are:

1. Some 73 days after receiving the transcript of her deposition, Plaintiff tendered 50 pages of substantive changes.
2. The deletions from, additions to, and reversals of her deposition testimony constitute material changes to the transcript of Plaintiff's deposition testimony and have been made in bad faith.

WHEREFORE, the Company respectfully requests that this Court suppress the revisions, find that Plaintiff has refused to sign her deposition transcript and deem the transcript an accurate representation of the deposition testimony to be used as fully as though signed. In addition, the Company believes that this Court should impose the cost of the Motion to Suppress on Plaintiff.

Respectfully submitted,

[Caption Omitted]

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO SUPPRESS
REVISIONS OF PLAINTIFF'S DEPOSITION**

Defendant, The Nashville Banner Publishing Co. ("the Company") has moved to suppress the attempted revisions by Plaintiff to her deposition, pursuant to Federal Rules of Civil Procedure 30 and 32, and the Court's inherent power. This memorandum is submitted in support of the motion.

FACTS

Plaintiff, formerly a confidential secretary with the Company, was terminated as part of a reduction in force. She sued, alleging age discrimination. In the course of discovery, the Company learned that Plaintiff had copied and stolen confidential company information. This serious misconduct while employed would have led to Plaintiff's immediate termination, if the Company had known of it.

The Company questioned Plaintiff about this misconduct in her deposition. Plaintiff admitted that she had copied confidential

* * *

A. BREACH OF CONFIDENCE

Plaintiff admitted in her deposition that, when she stole the documents, she knew that her behavior was wrong:

Q: [Mr. Wayland] And if you had violated those confidences and disclosed confidential information that you received as a result of your position as a confidential secretary, did you understand that you could be disciplined or discharged for that?

A: [Plaintiff] I never did that. I didn't have that problem. My reputation was confidential and discreet, so that was no problem.

Q: But if you had done it, did you understand that you could have been discharged for that?

A: *I think anybody would have thought that.*

Plaintiff's Dep. Vol. I 153. Plaintiff's version of the results of a breach of confidence now have been completely changed. In her revisions, Plaintiff tenders this answer: "No, not necessarily" Exhibit B. The reason given is "to correct the answer." Exhibit B.

In the following question, counsel explored her knowledge that the theft of confidential company information would lead to discharge:

Q: [Mr. Wayland] So you agreed with that and you understood that then?

A: [Plaintiff] Yes.

Plaintiff's Dep. Vol. I 153. In her revisions, Plaintiff seeks to delete the indicated answer and replace it with "No." The reason given for the change is "Upon further reflection."

The questioning continued:

Q: [Mr. Wayland] And the Company had the right to rely upon you not to disclose that information?

A: [Plaintiff] Yes.

Plaintiff's Dep. Vol I 153. In her revisions, Plaintiff instructs the court reporter to delete the "Yes" answer and replace it with "No." The reason given for the change is "To correct an error." Exhibit B.

Plaintiff as a confidential secretary was in a position of trust and knowingly violated that trust by stealing

information. Her knowledge that the job she held required a higher degree of discretion than she demonstrated is relevant to this lawsuit.

Another example involves Plaintiff's reasons for taking the company information:

Q: [Mr. Wayland] And you knew you weren't authorized to make the copies and take those home, didn't you?

A: [Plaintiff] Yes.

Q: Why did you do that?

A: For my protection. For insurance purposes.

Q: From what?

A: *I had began to notice a subtle trend of harassment, so I decided I might take them as insurance.*

Plaintiff's Dep. Vol. I 233-44. In her revisions, Plaintiff instructs the court reporter to delete the indicated answer and replace it with "For my protection." The reason given for the change is "To be more consistent."

These issues were sufficiently explored so that it is unlikely that Plaintiff was in any way confused. Plaintiff has not claimed that she was confused or that she misunderstood the questions. Rather, she seeks to simply change her story after being faced with a motion for summary judgment based on her prior sworn testimony. To allow Plaintiff to make these substantive revisions will corrupt the discovery process and transform it to a useless sham rather a method for learning the truth about pending cases.

B. PRIVILEGES

During her deposition, Plaintiff testified largely from note cards that her husband prepared for her. Plaintiff's Dep. Vol. I 127-31; Collective Exhibit 4. Despite using this

prepared script, Plaintiff now has attempted to revise her answers including changes from "Yes" to "no" or vice versa in sixteen places. Many of these revisions bear on her claims that privileges were denied to her and that these denials were a form of harassment designed to cause her resignation.

Plaintiff was asked whether her former supervisor treated her any differently from her last supervisor. For example:

Q: [Mr. Wayland] Now, did he [former supervisor] let you take longer than an hour for lunch?

A: [Plaintiff] No.

Plaintiff's Dep. Vol. I 76. Plaintiff's revisions change that answer to "Yes." The reason given is "To correct an error." Exhibit B.

Her other claims of privileges have been similarly altered:

Q: [Mr. Wayland] So the company had changed your parking space several times during your employment?

A: [Plaintiff] Yes.

Q: So that would be a change or difference in privileges; correct?

A: Right.

Q: So you understood what I mean when I say changes in privileges?

A: Yes.

Plaintiff's Dep. Vol. I 95. Plaintiff now attempts to insert a non-responsive discourse in lieu of her answer:

But the main issue here is the fact that I had a

reserved parking space at various Banner parking location for at least fifteen years. That privilege was stripped away from me shortly after I began working for Ms. Stoneking. The removal of this privilege was one of the earlier harassments and mistreatments of me by Banner management in hopes I would resign or retire.

Exhibit B. The reason offered for deleting the "Yes" and adding this non-response is "To supplement answer." However, based on Plaintiff's agreement during the deposition that she understood the terms, the questioning continued:

Q: [Mr. Wayland] Were there any other changes like that during the course of your time with the *Banner*?

A: [Plaintiff] Yes. Then I -- when you say privilege, I consider it a privilege. During the whole time that I worked at the paper, I was allowed to read the newspaper as my workload permitted.

Q: Yes, ma'am. Now you just read that off of one of your little cards [Exhibit 4 to Plaintiff's Deposition], didn't you?

A: Yes. Ms. Stoneking told me I could not read the newspaper, period.

Q: You just read that off the card your husband prepared for you; correct, about reading the newspaper?

A: These are my writings -- it's his writing, but it's my comments.

Q: Right. But you just read that, didn't you?

A: Yes.

Plaintiff's Dep. Vol. I 95. Plaintiff has tried to delete the "Yes" and insert another non-responsive speech here:

No. The main issue here is for the entire 39 1/2 years I worked at the newspaper, I had been allowed to read the newspaper as my workload permitted. Only under Mr. [sic] Stoneking was that privilege stripped away. At the same time, other secretaries were allowed this privilege. *Discriminating treatment without a doubt.*

Exhibit B. Plaintiff gives as a reason, "To correct an error."

When asked whether he duties were the same throughout her time as a secretary to her former supervisor, Plaintiff testified:

A: Yes. When I left being his secretary, I still was doing the community affairs department.

Plaintiff's Dep. Vol. I 65. Now, she has told the court reporter to change the answer to "No." The reason given for the change is "to correct an error." Exhibit B.

C. THE REDUCTION IN FORCE

Plaintiff contends in this lawsuit that she had a right to be transferred to another position rather than terminated in a reduction in force. She argues that not transferring her is evidence of discrimination. The Company has no obligation to offer a transfer. However, Plaintiff was asked about her willingness to be transferred to another position in the front office. She testified:

A: I may have said I don't want to go, but I never said I wouldn't go because I told Mr. Simpkins I was going.

Plaintiff's Dep. Vol. I 120. The new answer is "No." the reason given is "More appropriate answer." Exhibit B. The answer is more appropriate only in that Plaintiff believes it favors her legal position.

Later during the deposition she again admitted that she had not wanted to transfer:

Q: [Mr. Wayland] Now, one more time. Isn't it true that you told Ms. Stoneking at some point in time after your started working as her secretary that you did not want to work in the executive office for Mr. Curry and Mr. Simpkins?

A: [Plaintiff] Not Mr. Curry, No, I did not say I didn't want to work for Mr. Curry. I said I didn't want to go up there.

Q: You told Ms. Stoneking that?

A: But I --

Q: Excuse me. You told Ms. Stoneking that?

A: *That's correct. But I want it on the record that it's not that I didn't say I won't go up there. I said I didn't want to go on there.*

Plaintiff's dep. Vol. I 149. In her revisions, Plaintiff attempts to delete the admission that she did not want an alternate position and substitute: "That's not correct. I may have said I preferred to work in other areas than the executive office." The reason given for the substitution is "To supplement the answer."

These are a few examples from the 160 changes that Plaintiff delivered to the court reporter, after waiving signature by failing to sign the deposition volumes by February 6, 1992. If these pervasive changes are allowed would be to make the time-consuming and expensive deposition essentially useless and to circumvent the Company's opportunity to explore the facts and reasons behind many clearly untruthful answers.

The court should not allow the Plaintiff to mock the judicial process by these revisions. Rule 32 gives the

Court the power to suppress all or part of a deposition. Changes to a deposition have

**EXHIBITS TO DEFENDANT'S MOTION TO SUPPRESS
REVISIONS OF PLAINTIFF'S DEPOSITION**

**[Caption Omitted]
DECLARATION OF TERI CAMPBELL**

I, Teri Campbell, do hereby state and affirm upon personal knowledge as follows:

1. I am a registered professional reporter and notary public for the State of Tennessee. I have been a court reporter for 17 years.
2. I was the court reporter for the deposition of Christine McKennon, on December 17 and 18, 1991.
3. I reduced the deposition to typewritten form and delivered it to counsel for the parties on December 31, 1991 and January 6, 1992.
4. On March 18, 1992, Plaintiff in this case, Christine McKennon hand-delivered to me fifty pages of errata for the deposition.
5. The changes ordered by the Plaintiff are not corrections of transcription errors.
6. I have not yet inserted the changes and stated reasons into the record, being unsure of whether these changes are allowable, given the lapse of time, and of who would pay for the revision given Plaintiff's cover letter.
7. I have never before had anything like these changes in all the hundreds of depositions that I have taken. I pointed this out to Mr. Wayland in a letter to him; a true and correct copy of that letter is attached hereto as Exhibit C-1.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 7th day of April, 1992.

TERI CAMPBELL

HAND DELIVERED

March 18, 1992

Ms. Teri A. Campbell
Nashville Court Reporters
P.O. Box 290903
Nashville, TN. 37229-0903

Dear Teri:

I am hereby delivering to you today the following:

- (1) Nineteen (19) sheets of corrections, changes, etc. to my deposition of December 17, 1991 which you recorded at the offices of King & Ballow. These sheets are all consecutively numbered from 1-19 and are all properly marked as Volume I.
- (2) Thirty-one (31) sheets of corrections, changes, etc. to my deposition of December 18, 1991 which you recorded at the offices of King & Ballow. These sheets are all consecutively numbered from 1-31 and are all properly marked as Volume II.

I do not feel comfortable signing anything until I have your written assurance that the changes are properly received and have been recorded appropriately.

While I would like for my attorney to have a completely revised version of my deposition, I am not in a position to pay \$1.35 per page for photocopying. Therefore, your assurance, in writing, that all these changes, corrections, etc. have been made will be the document that causes me to sign the appropriate forms and have my

signature notarized.

In order there is no mistake, I am not going to pay any additional amount to get photocopies of my deposition. The \$813.30 I paid for photocopies originally, I feel, was absorbent.

My attorney, Michael E. Terry, is out of town this week, however, he is due back next Monday, March 23.

Sincerely,

Christine P. McKennon

cc: Michael E. Terry

I, CHRISTINE McKENNON, do hereby certify that I have read the foregoing transcript of the deposition given to me on the 17th day of December, 1991, and that this is a true and accurate record of the testimony given by me, except for the following corrections I believe should be made.

Page	Line	Reads	Should Read
<u>76</u>	<u>13</u>	<u>No</u>	<u>Yes</u>

Reason for Change	<u>To correct an error</u>
<u>89</u>	<u>7</u>
	<u>Knew</u> <u>Remembered</u>

Reason for Change	<u>More appropriate answer</u>
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<u>95</u>	<u>20</u>	<u>Writings</u>	<u>Words</u>
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Reason for Change	<u>More appropriate answer</u>
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<u>120</u>	<u>9,10 & 11</u>	<u>Delete this 3 line answer and insert</u>	<u>No</u>
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Reason for Change	<u>More appropriate answer</u>
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<u>153</u>	<u>16</u>	<u>Yes</u>	<u>No</u>
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Reason for Change	<u>Upon further reflection</u>
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<u>159</u>	<u>4</u>	<u>64</u>	<u>63</u>
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Reason for Change	<u>To correct an error</u>
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		<u>For the first couple</u>
<u>172</u>	<u>13</u>	<u>Well, as I say, of months</u>

Reason for Change	<u>To more accurately respond</u>
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<u>179</u>	<u>25</u>	<u>Through March</u>	<u>Delete: Through March</u>
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Reason for Change	<u>Upon further reflection</u>
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<u>193</u>	<u>6</u>	<u>budget</u>	<u>computer</u>
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Reason for Change	<u>To correct an error</u>
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I, CHRISTINE McKENNON, do hereby certify that I have read the foregoing transcript of the deposition given to me on the 17th day of December, 1991, and that this is a true and accurate record of the testimony given by me, except for the following corrections I believe should be made.

Page	Line	Reads
<u>66</u>	<u>16 & 17</u>	<u>Delete 2-line answer and insert</u>

Reason for Change To correct an error
 No _____

Page	Line	Reads
<u>95</u>	<u>6</u>	<u>Delete 1-line answer and insert</u>

Reason for Change To supplement the answer

But the main issue here is the fact I had a reserved parking space at various Banner parking locations for at least 15 years. That privilege was stripped away from me shortly after I began to work for Ms. Stoneking. The removal of this privilege was one of the earlier harassments and mistreatment of me by Banner management in hopes I would resign or retire.

Page	Line	Reads
<u>95</u>	<u>23</u>	<u>Delete 1-line answer and insert</u>

Reason for Change To correct an error

No. The main issue here is for the entire 19 1/2 y ars I

worked at the newspaper. I had been allowed to read the newspaper as my workload permitted. Only under Mr. Stoneking was that pri-

ilege stripped away. At the same time, other secretaries were allowed this privilege. Discriminating treatment without a doubt.

Page	Line	Reads
<u>114</u>	<u>22</u>	<u>Beginning at line 22 and delete the entire answer</u>

115 4 all 8 lines ending on page 115 line 4 and change to read

Reason for Change To correct the statement

No. I had not received the news about my Mother's eyesight as of that time. Very late in the day, maybe 4:15 p.m., I was in Mr. Gunter's office when Mr. Simpkins entered and asked me why I was crying. I told him about the news of my Mother's eyesight loss. Then, Mr. Simpkins said, "Well, I just came back to tell you (Chris) Jack has done a good selling job, etc. You are not going to be

moving up front after all." For the record, my Mother is
now legally blind.

I, CHRISTINE McKENNON, do hereby certify that I have read the foregoing transcript of the deposition given to me on the 17th day of December, 1991, and that this is a true and accurate record of the testimony given by me, except for the following corrections I believe should be made.

Page	Line	Reads
------	------	-------

128	12 thru 15	<u>Delete all four lines of answer and</u> <u>insert</u>
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Reason for Change To correct an error

No. The substance is mine. He printed them for me while
I dictated them. He prints better than I do. I asked him to
print them for me so the captions would be larger than my
typewriter could make. Also, some of my notes were in
shorthand.

Page	Line	Reads
------	------	-------

149	9 thru 12	<u>Delete 3-line answer and insert</u>
-----	-----------	--

Reason for Change To correct an error

No. I may have said I preferred to work in other areas
rather than in the executive offices.

112a

Page	Line	Reads
149	15 thru 17	Delete 3-line answer and insert
<u>Reason for Change To supplement the answer</u>		
<u>That's not correct. I may have said I preferred to work in</u>		
<u>other areas than in the executive offices.</u>		

113a

I, CHRISTINE McKENNON, do hereby certify that I have read the foregoing transcript of the deposition given to me on the 17th day of December, 1991, and that this is a true and accurate record of the testimony given by me, except for the following corrections I believe should be made.

Page	Line	Reads
149	22 thru	
150	1	Delete 5-line answer and insert

Reason for Change To correct the record

No, I did not tell her that.

Page	Line	Reads
153	13	Delete 1-line answer and insert

Reason for Change To correct the answer

No, not necessarily

Page	Line	Reads
155	8	Delete 1-line answer and insert

Reason for Change To supplement my answer

I'm not sure I knew the amount Mr. Currey paid for his
Lexus I told my husband Mr. Currey bought a new Lexus
and the following day was involved in a "fender bender" near
the newspaper building. I then asked my husband if he knew

114a

what a Lexus looked like. He said, "Yes, there's a
dealership up the street from our church, I'll show you
Sunday."

115a

March 23, 1992

HAND DELIVERED

Michael E. Terry, Esq.
Suite 315
150 Second Avenue North
Nashville, Tennessee 37201

Re: McKennon v. Nashville Banner Company

Dear Mr. Terry:

We received from the court reporter on March 19, 1992, a hand-delivered package of fifty pages of "errata" for Plaintiff's deposition. The two-volume deposition was initially delivered by the court reporter on December 31, 1991, and January 6, 1992.

Plaintiff's signature and right to make legitimate changes or corrections to her deposition were waived when she failed to comply with the requirements of Rule 30 of the Federal Rules of Civil Procedure. Further, we are shocked that she would belatedly attempt through her proposed changes to fundamentally alter her version of the facts as she testified to under oath. The changes she proposes are an outrageous subversion of the Federal Rules of Civil Procedure and the integrity of the judicial process.

It is entirely improper for Plaintiff to attempt to change the substance of her answers. Never in the practice of law have I seen such clear factual manipulation and dishonesty. The court reporter's cover letter confirms our belief that Plaintiff's willingness to "revise" her prior sworn testimony is at least extraordinary.

Plaintiff's letter indicates that you were out of town when the proposed "errata" were delivered. Perhaps you

have not had an opportunity to review her "errata." Therefore, we call on you to instruct your client to withdraw all the purported changes that she tendered to the court reporter.

Failing withdrawal of the "errata," we will seek from the Court all appropriate remedies and sanctions, including suppression of the changes, costs, and possible dismissal of the suit. We look forward to your prompt response.

Sincerely,

R. Eddie Wayland /s/
R. Eddie Wayland

REW/jk

[Caption Omitted]

DEPOSITION OF CHRISTINE McKENNON

Tuesday, December 17, 1991

VOLUME 1

[29] A. "Willful conclusions." My attorney and I have drawn conclusions that it was a willful act from the certain facts that I can present you whenever you would like to hear them.

Q. You say "copyboy, Pete Green."

A. Yes. He was one of the ones that was terminated.

Q. Have you spoken to Mr. Green about this lawsuit?

A. I have not.

Q. There's some shorthand here, and then the word "contract," and then more shorthand, and then below it is the word "comptroller."

A. That was any confidential information that I had would be seen because I worked for the comptroller.

Q. Would you explain what you mean by that?

A. You had to see confidential information when you worked for the comptroller.

Q. That was part of your job?

A. That was part of my job.

Q. And you understood that was confidential information?

A. I certainly did. I was a very confidential secretary. That's probably why -- I was discreet; I was very

confidential.

[30] Q. And you understood your job required you to be confidential?

A. That's right.

Q. Down at the bottom, what is that?

A. Oh, yes. Oh, yes.

Q. If you would, just tell me what that says, please.

A. I have to elaborate, Mr. Wayland, to tell you what --

Q. You can read what it says.

MR. TERRY: Tell him first what it says, and then you have a right to explain your answer.

THE WITNESS: "Elise asked for secretarial files. Calculated harassment." Okay. She came in a month before the firing. She asked for all the secretarial files. She took them out. That shows deliberate, calculated, willful motivation on her part.

She did not bring them back in. I asked Ms. Stoneking, "What's going on? Why did she ask for all the secretarial files?" She never answered me. About ten days or maybe two weeks -- I don't know what time span it was -- they never did come back. She never did bring them back, nor did her secretary.

So I checked the files one day. They were all back. They sneaked them back in when I was at

[37] Q. Did the company continue to pay you during that period of time that you were off?

A. Yes.

Q. How old were you then?

A. '79? About 51.

Q. Was Mr. Simpkins the publisher of the newspaper at that time?

A. Mr. Simpkins bought the *Banner* in August of 1979.

Q. So the answer to the questions is yes?

A. Yes.

Q. Have you had any surgery since 1979?

A. Not since 1979.

Q. Any other medical problems of any nature?

A. Since 1979?

Q. Yes, ma'am.

A. No.

Q. Any psychiatric problems or treatment since 1979?

A. No.

Q. You know I'm talking about 1979 to date?

A. That's correct; yes, I understand that.

Q. Any psychological problems?

A. No.

Q. Have you been under the care of a physician

[42] that she not disclose the exact dollar amount. In other words, she does recall that. Although Mr. McKennon does not, she does. But it is her recollection that she's prohibited from disclosing the exact dollar amount by a document that

they maintain in a lockbox at their home.

Mr. McKennon will retrieve that document and read it; and I will read it and see what our obligations are. I do not recall the exact dollar amount. She has told me what she recalls it as. It reinforces my opinion that is not relevant evidence. But I will look at that and I may be able to share the document with you and let you decide whether or not it's disclosable. I want it to be clear that that is the only specific fact that she has any recollection about that has not been disclosed. Everything else has been told.

BY MR. WAYLAND:

Q. Now, Ms. McKennon, you started in the -- when did you start working for *The Nashville Banner*?

A. The latter part of January, 1971.

Q. '71?

Q. '71?

A. Right.

Q. So your employment history from 1951 to '71 was not with *The Nashville Banner*, was it?

A. No. It was with NPC.

Q. And that was a distinct employer from *The [43] Nashville Banner*, isn't that correct?

A. That is the -- they are all considered the same. When I was transferred to the *Banner*, we were under the same pension and the same vacation policy. You do not have to start again like you would a new company. In other words, my term of employment would not start in '71. It still remains at '51 -- 1951. My vacation continued on, so that is a continuation of 39 years.

Q. You're talking -- Ms. McKennon, your deposition is going to go a lot quicker if you'll just answer

my questions not and elaborate. I want to get answers to my questions. The Newspaper Printing Corporation and *The Nashville Banner* are two different entities, aren't they?

A. They were.

Q. They still are, aren't they?

A. Well, NPC is no longer.

Q. No longer what?

A. No longer NPC. It's *Banner* and *Tennessean*.

Q. All right. When did that occur?

A. I don't know. Several years ago.

Q. When you came to *The Nashville Banner* that was a different entity than Newspaper Printing Corporation; correct?

* * *

[46] came to *The Nashville Banner* in 1971 that was a separate entity than NPC?

A. Yes.

Q. You worked for different people then than you had when you worked for NPC?

A. That's correct, yes.

Q. The *Banner* continued to be a separate company from NPC after you came to work at the *Banner*; correct?

A. Yes.

Q. And it continued to be a separate company through today; is that correct?

A. Yes.

Q. At some point in time, if I understand your

testimony, NPC was dissolved?

A. Right.

Q. It became the *Banner* and *Tennessean*?

A. Right.

Q. And they are separate companies; correct?

A. They are separate companies, but we have the same vacation. It's all -- what I'm trying to say, Mr. Wayland, is my employment date is not chopped off at 1971. We're all under the same pension -- we were under the same pension plan years ago. We had the same policy on vacations. When I came to the *Banner*, I didn't

* * *

[66] Q. Basically it was a secretarial function that you performed; correct?

A. Yes. Also it was a lot of form letters that Jane Srygley got out. It was a lot of stuffing of envelopes.

Q. Any other change in your duties during the time you worked for Mr. Gunter from the beginning to the end?

A. I don't believe so.

Q. Was there any decrease in your duties during the time you worked for Mr. Gunter?

A. No.

Q. Everything you told me you did for him at the start, you continued to do for him when you left being his secretary in 1989?

A. Yes. When I left being his secretary, I still was doing the community affairs department.

Q. Were you doing all the other things, the payroll and the letters?

A. Yes. Excuse me. The payroll -- the payroll was shifted back to Elise McMillan's office with Helen Fuller, her secretary, doing the payroll.

Q. When was that?

A. I believe that was shifted -- if my memory serves me correctly, that was shifted when Mr. Gunter was

* * *

[76] Q. And that was from the time you came to the *Banner* until the time you left; correct?

A. That's correct.

Q. What you're saying is that during this period of time, some of your bosses didn't hold you to the 11:00 to 12:00 lunch hour?

A. That's right.

Q. Now, would Mr. Gunter hold you to the 11:00 to 12:00 lunch hour?

A. No.

Q. Did he let you take longer than an hour for lunch?

A. No.

Q. He never let you take longer than an hour for lunch?

A. I may have been late coming back five minutes. What I'm saying --

Q. No, ma'am. I just asked did he ever let you take longer than an hour for lunch? That's all I'm asking.

A. Yes, I was longer than an hour sometimes.

Q. How often did you take longer than an hour for lunch while you worked for Mr. Gunter?

A. It probably averaged five or ten minutes.

Q. How many times a week?

* * *

[95] Q. So that would be a change of difference in privileges; correct?

A. Right.

Q. So you understand what I mean when I say changes in privileges?

A. Yes.

Q. Were there any other changes like that during the course of your time with the *Banner*?

A. Yes. when I -- when you say privilege, I consider this a privilege. During the whole time that I worked at the paper, I was allowed to read the newspaper as my workload permitted.

Q. Yes, ma'am. Now, you just read that off of one of your little cards, didn't you?

A. Yes. And Ms. Stoneking told me I could not read the newspaper, period.

Q. You just read that off the card that your husband prepared for you; correct, about reading the newspaper?

A. These are my writings -- it's his writing, but it's my comments.

Q. Right. But you just read that, didn't you?

A. Yes.

Q. Any other privileges other than the newspaper privilege?

* * *

[120] A. I never used the words "I won't go to the front office."

Q. No, ma'am. That wasn't my question, Ms. McKennon.

A. I said, "I prefer to be your secretary out here."

Q. My question is, did you ever use the words with Mr. Gunter "I don't want to go to the front office?"

A. I may have said I don't want to go, but I never said I wouldn't go because I told Mr. Simpkins I was going.

Q. Did you ever use the words with Mr. Gunter that you didn't like working in the front office?

A. No.

Q. Prior to this time when Mr. Simpkins said he was thinking about transferring you to the front office in 1988, isn't it true that you had an occasion filled in the front office for short periods of time?

Q. Not on a regular basis.

Q. But you had done it, hadn't you?

A. Just to look after the phone.

Q. Did you do it after this in 1988 -- this period of time we're talking about?

A. I'm sorry. I can't remember. It was done periodically. I can't pinpoint a time.

* * *

[127] (Chris McKennon's Duties at Time of Termination on 10/31/90 marked Exhibit 3.)

BY MR. WAYLAND:

Q. So it's your testimony that you typed what's on

Exhibit 3, your list of job duties?

A. I typed it up.

Q. Then he marked the yellow highlights and wrote "new"?

A. Yes.

Q. What's the significance of the yellow highlighting on items one, three, four, five, seven and eight?

A. Okay. The highlighting is what I was doing. Of course, these were all of my duties when I was working for Ms. Stoneking. These that are highlighted are duties that I was also performing when I was working for Mr. Gunter. The new ones, two, six and nine, are the new duties that I had when I was working for Ms. Stoneking that I did not perform for Mr. Gunter.

Q. So as I understand it, the ones that are new are duties you performed in addition to the duties you performed previously?

A. Under Ms. Stoneking; that's correct.

Q. Now, prior to the lunch break this morning, [128] one of the things you showed me was a series of three-by-five cards numbered 1 through 19.

A. Yes.

Q. You testified that these were written in your husband's handwriting?

A. That is correct. I also, I believe, made a notation that I had written some lines on about three of the cards.

Q. On three of the cards you had written something additional on them, but the substance is basically your husband's?

A. That's correct. They were comments for me,

and he wrote them in his handwriting with the exception, I believe, of, like I say, three cards that has a little bit of my handwriting on it.

Q. Show me the cards that have your handwriting on it. Which ones are they?

A. These three.

Q. For the record, the three cards that have your handwriting on it are card number 10 that's entitled "Early Mondays." And there is some handwriting --

A. That is my handwriting.

Q. -- "didn't do me any good."

A. Right.

Q. Then card number 19 says "Vacation Day and [129] Discrimination"?

A. That's right. And the last paragraph, the last sentence.

Q. It says, "Harold Huggins, Jim Laise, Sara Dunn, Susan Quick. Work sheet - '88 & '89."

A. Right.

Q. And then card 18 entitled "Parting Remarks."

A. The "over" down there is my handwriting.

Q. You wrote "over" on the front?

A. That's correct.

Q. And on the back of the card you say, "no punch and cake; no gold watch; no appreciation"?

A. That's correct. That's my handwriting; right.

Q. May I have the cards back, please.

A. Yes. (Witness passes cards to counsel.)

MR. WAYLAND: For the record, I want these cards -- card number one says, "Reading Newspaper at Desk -- as work allowed." That's the title of it. Then there's handwriting.

Card two days --

MR. TERRY: Is this testimony?

MR. WAYLAND: -- "Subtle Remarks About Retirement." I'm identifying them for the record.

MR. TERRY: They are identified by [130] number, aren't they?

MR. WAYLAND: Card two says, "Subtle Remarks About Retirement." Card three says, "Beauty Shop Privilege." Card four says, "Two Hours of Sick Leave. November '89." Card five says, "Subjected to Verbal Abuse/Humiliation, June '90." Card six says, "The Threat of Staff Reductions." Card seven says, "Price Waterhouse." Card eight says, "Personnel Telephone Calls." Card nine is entitled "Irby Says." Again, each of these cards, I'm just reading off the title of the card. Card number ten is entitled "Early Mondays." Card number 11 is entitled "Irby Simpkins Will Fix It."

BY MR. WAYLAND

Q. There's handwriting "Hattie Corley." Is that your handwriting?

A. That's my husband's. Let see that for a moment.

Q. That's card number 11.

A. That's my husband's.

MR. WAYLAND: Card number 12 is entitled "You Can't Win." Card number 13 is "Lunch Hour Harassment." Card number 14 is, "What are Your Retirement Plans." Card number 15 is, "Leaving My Desk

(after she left.)" Card number 16 is "Work on Saturdays." Card number 17 is "Vacation Discrimination." [131] Card number 18 is "Parting Remarks." Card number 19 is entitled "Vacation Pay." I want to mark these cards as Collective Exhibit 4.

(Copies of 19 handwritten note cards by Mr. McKennon and Ms. McKennon marked Collective Exhibit 4.)

THE WITNESS: May I have the cards back, Mr. Wayland, or are they to be turned in to you?

MR. WAYLAND: I think we can -- at an appropriate time, we'll make copies of the cards and make the copies the exhibit, and you can have the actual cards back.

MR. TERRY: And you can refer to any of these exhibits while you're being deposed.

MR. WAYLAND: Counsel, that's kind of what I wanted to talk to you about. During the course of Ms. McKennon's deposition this morning, we took an inordinate amount of time, in my judgment, to cover relatively simple matters. Throughout the course of her testimony, as I noted repeatedly on the record, she had these cards in front of her in her hands. She repeatedly referred to the cards to answer questions and to give answers oftentimes which were not responsive. It was very obvious that she was in effect testifying from her note cards.

* * *

[136] needs to be refreshed, she's entitled to refresh her recollection.

BY MR. WAYLAND:

Q. Ms. McKennon, we talked previously before

lunch about this break -- this area of breaks and entitlement to breaks. What do you base your understanding that you were entitled to two, fifteen-minute breaks on?

A. That was just a normal office procedure that people get breaks from their work.

Q. Is it your testimony that people at the *Banner* got two, fifteen-minutes breaks from their work every day?

A. I did not see a policy as such. When I was in advertising and classified, it was a general practice. I always took breaks when I was with NPC. I cannot answer -- I really cannot give you an answer why I never took breaks at the *Banner*. It was just something that I had never done. It was stopped when I went there in '71. Why? I can't answer why. I just did. It was a general procedure known that secretaries got breaks.

Q. When you were working at NPC, you got two, fifteen-minute breaks?

A. That's correct.

Q. I'm not talking about NPC, Ms. McKennon, I'm [137] talking about the *Banner*. Are you aware of any policy that was in effect at the *Banner* from 1979 on that said you got to take two, fifteen-minute breaks?

A. There was no policy at the newspaper to my knowledge. It was just a general consensus people that needed to get away for a little while from their work.

Q. Yes, ma'am, but that's different than two, fifteen-minutes breaks every day, isn't it?

MR. TERRY: Objection to the argument.

BY MR. WAYLAND:

Q. Getting away from their work is different than, two, fifteen-minute breaks every day, isn't it?

A. You would take a fifteen-minute break to get away from your desk and come back refreshed.

Q. Is it your testimony that you were entitled under company policies and practices to two, fifteen-minutes breaks every day from 1979 until your separation from employment?

A. That was no set policy. It was just understood like it was when I was in advertising. People did that. They took a smoke break, coffee break, Coke break, whatever. To my knowledge, Mr. Wayland, I never did see it in writing as a policy, but people did it.

Q. Did anybody ever tell you, you were entitled to two, fifteen-minute breaks every day from 1979 until

* * *

[149] repeat the same question five times before I finally get an answer. So would you please try to cooperate with me?

A. Yes, I will.

Q. Now, one more time. Isn't it true that you told Ms. Stoneking at some point in time after you started working as her secretary that you did not want to work in the executive office for Mr. Currey and Mr. Simpkins?

A. Not Mr. Currey, no, I did not say I didn't want to work for Mr. Currey. I said I didn't want to go up there.

Q. You told Ms. Stoneking that?

A. But I --

Q. Excuse me. You told Ms. Stoneking that?

A. That's correct. But I want it on the record that it's not that I didn't say I won't go up there. I said I didn't want to go up there.

Q. Yes, ma'am. Thank you for finally answering

my question, Ms. McKennon. Now, did you also tell Ms. Stoneking that you did not want to work for Irby Simpkins in the front office?

A. I don't know that I told her I didn't want to work for Irby Simpkins. I made the statement that I didn't want to go work up in the executive offices because I was happy where I was. I did not want to

* * *

[152] A. Not as much as Ms. Stoneking. The payroll.

Q. But at one point you did payroll with Mr. Gunter, too, didn't you?

A. Yes.

Q. And you understood that you were to treat that information confidential --

A. I did.

Q. -- for Mr. Gunter?

A. I did.

Q. Did you also understand that you should treat the information that you dealt with in connection in working for Ms. Stoneking as confidential?

A. I did.

Q. And you understood that that was proprietary business information?

A. I did.

Q. You understood that it was not supposed to be disclosed?

A. Yes.

Q. And you understood it was not supposed to be disclosed outside of the workplace and people who were

authorized to know at the company?

A. Yes.

Q. There wasn't any question about that in your mind, was there?

[153] A. I was a highly confidential secretary and discreet.

Q. And if you had violated those confidences and disclosed confidential information that you received as a result of your position as a confidential secretary, did you understand that you could be disciplined or discharged for that?

A. I never did that. I didn't have that problem. My reputation was confidential and discreet, so that was no problem.

Q. But if you had done it, did you understand that you could have been discharged for that?

A. I think anybody would have thought that.

Q. So you agreed with that and you understood that then?

A. Yes.

Q. And the company had a right to rely upon you not to disclose that information?

A. Yes.

Q. And did you ever while you were employed at *The Nashville Banner* breach a confidentiality -- that confidentiality obligation that you had?

A. I certainly didn't.

Q. It's your testimony you never divulged to anyone outside the company any proprietary information?

* * *

[155] Q. Did you tell him how much money { } spent on a car?

A. I may have.

Q. Did you?

A. Probably yes. When he bought a Lexus, yes.

Q. In fact, you did tell your husband that, didn't you?

A. Yes.

Q. In fact, you and your husband went down to find out how much one cost and to look at the car, didn't you?

A. We pass the Lexus --

Q. No, ma'am. Just answer my question.

A. Yes, sir, it is. We pass the dealership every Sunday morning from church. That's not going and looking at a Lexus.

Q. Did you tell your husband how much money different people at the *Banner* made?

A. Not everybody.

Q. But some people?

A. Yes, to my husband, but that's all.

Q. But you did tell your husband, didn't you?

A. Not everybody's salary.

Q. Well, whose salary did you tell your husband?

A. I cannot pinpoint that, Mr. Wayland.

[156] Q. Mr. Simpkins'?

A. I cannot pinpoint.

Q. Did you tell him Mr. Simpkins' salary?

A. Yes.

Q. Did you tell him Mr. Currey's salary?

A. Yes.

Q. Did you tell him Ms. McMillan's salary?

A. Yes.

Q. Did you tell him Ms. Stoneking's salary?

A. Yes.

Q. Did you tell him Mr. Gunter's salary?

A. Yes.

Q. Did you tell him Mr. Jones' salary?

A. Yes.

Q. Did you tell him Mr. Kessler's salary?

A. I don't remember.

Q. Did you tell him other secretaries' salaries?

A. Yes.

Q. Did you tell him other employees' salaries?

A. I don't know how many people I told, but I consider my husband and myself as one person. I don't consider that going outside the building and telling confidential items.

Q. Your husband is not an employee of *The Nashville Banner*, is he?

* * *

[158] discussions about the confidentiality of the information that you had access to as a result of being her secretary?

A. Did we ever -- please restate that.

Q. Did you and Ms. Stoneking ever had discussions about the confidentiality of the information that you had access to as a result of being her secretary.

A. Oh, yes. We both knew that it was highly confidential.

Q. Didn't she sometimes tell you not to talk about those kind of things?

A. No, because she trusted me. She knew I was confidential when I went to work for her. That was my reputation.

Q. Do you think she had the right to rely upon you in that regard?

A. I know she had the right to rely upon me.

Q. Now, do you recall there came a time when Ms. Helen Fuller retired?

A. Yes. She retired June 1st.

Q. Of what year?

A. 1990.

Q. Her position -- she was Elise McMillan's secretary before her retirement, was she not?

* * *

[160] want to transfer to Ms. McMillan?

A. Oh, no. I would like to interject here if I might, Mr. Wayland, I was happy working for Ms. Stoneking until the pattern started of all of the harassments. Then after the harassments, they were unbearable, and then, of course, I was unhappy. I've always enjoyed my job.

Q. It was unbearable?

A. Yes, it was when the harassment started.

Q. When did the harassment start? Sometime after June of 1990; is that right?

A. No, about April 1990. One thing, she told me I couldn't read the newspaper anymore. I had always -- my workload permitting, I had always been able to do that as my workload permitted. The other secretaries were able to do it.

Q. As your workload permitted; is that right?

A. That's correct.

Q. But, in any event, in June of 1990, when a position came open for Ms. McMillan's secretary, you were very happy and satisfied with your position with Ms. Stoneking?

A. Yes, I was.

Q. Now, you became Ms. Stoneking's secretary in March of 1989?

* * *

[167]A. I did not.

Q. When you transferred to work for Ms. Stoneking was there any changes in your wages?

A. That was in March. Yes, because April was when the secretaries got their raises. So I -- yes, I had a raise that April.

Q. As part of your wage review; correct?

A. Mr. Gunter did not give me -- it was during the demotion and so forth, so he did not write up an evaluation on me during 1989. The raise became effective in April. The once-a-year raise for the secretaries came in April.

Q. Every year; correct?

A. That's correct.

Q. So when you transferred to Ms. Stoneking's secretary, your wages weren't changed at that time?

A. In March, no.

Q. They were changed in April consistent with the yearly-wage review; correct?

A. That's correct.

Q. And you received an increase in wages; is that correct?

A. That's correct.

Q. You keep saying Mr. Gunter was demoted. Did anybody ever tell you that?

[168] A. Yes.

Q. Who?

A. It was common knowledge.

Q. Who told you that Mr. Gunter was demoted?

A. When somebody --

Q. No, ma'am. Who told you Mr. Gunter was demoted?

A. Mr. Gunter -- I don't want to say this.

MR. TERRY: State your problem with answering the question.

BY MR. WAYLAND:

Q. Do you understand the question?

A. I understand the question, but I can't say that anyone actually told me. It was just knowledge.

Q. So the answer is nobody told you that Mr. Gunter was demoted, did they?

A. No, I can't think of anybody specifically. It was common knowledge.

Q. Do you know for a fact whether or not Mr. Gunter was demoted, or is that just your characterization?

A. No, it was a demotion. Everyone considered it a demotion.

Q. But nobody from the company announced that Jack Gunter was demoted, did they?

[169] A. Everyone including the *Tennessean* --

Q. No, ma'am. Nobody from the company --

MR. TERRY: Let her finish.

MR. WAYLAND: Well, she's not answering my question.

MR. TERRY: How do you know until she finishes?

MR. WAYLAND: She's talking about the *Tennessean*. The company doesn't involve the *Tennessean*.

BY MR. WAYLAND:

Q. Nobody from the *Banner* told you -- by the *Banner*, I mean the company, anybody in a position of authority -- told you or anyone else that Jack Gunter had been demoted, did they?

A. I don't know of anybody specifically telling me.

Q. Thank you. Now, other than these additional duties that you assumed when you became Ms. Stoneking's secretary, were there any other changes in your duties?

A. No, not to my knowledge.

140a

Q. Were there any changes in your hours of work?

A. No.

Q. The same hours of work? I believe you testified previously that your lunch period stayed the

* * *

141a

[Caption Omitted]

DEPOSITION OF CHRISTINE McKENNON

Wednesday, December 18, 1991

VOLUME II

* * *

[223] going to be documents that we are designating as confidential pursuant to the protective order. This might take a moment or two if you want to take a short break and stretch your legs. We'll go off the record. Is that acceptable?

MR. TERRY: Sure.

(Recess taken *Banner* Fiscal Payroll Ledger ending 9-30-89 marked Exhibit 24. *Banner* Profit & Loss Statement for October of 1989 marked Exhibit 25. Handwritten notes to Irby Simpkins from Elise McMillan Marked Exhibit 26. Memo dated 2-23-89 to { } from Elise McMillan marked Exhibit 27. Memo dated 2-3-89 to Irby Simpkins from Imogene Stoneking marked Exhibit 28. Two pages of handwritten notes in re: { } marked Exhibit 29. Employment Agreement dated 3-1-89 between { } and *Banner* marked Exhibit 30.)

MR. WAYLAND: We have marked for purposes of exhibits to the deposition of Ms. McKennon exhibit Exhibits 24 through 30. These are documents that we are specifically identifying as confidential pursuant to the terms of the protective order.

BY MR. WAYLAND:

Ms. McKennon, let's start with Exhibit 24 that you

have in front of your. It's entitled -- also to [224] the extent necessary, the transcript references to these exhibits are considered to be confidential under the protective order.

Exhibit 24 is a *Nashville Banner* Fiscal Period Payroll Ledger. Do you see that?

A. Yes.

Q. You had a copy of that; is that correct?

A. I don't recall that.

Q. Your counsel produced that as part of your responses to the interrogatories; correct?

A. Okay. Yes.

Q. Now, do you see handwriting on there that says "annual"?

A. Yes.

Q. And a figure. Whose handwriting is that?

A. My husband's.

Q. So you took this document home and showed it to your husband?

A. Yes.

Q. Where did you get this document?

A. I come across all of this confidential information in the comptroller's office. I mean, it was made available to me.

Q. So you obtained this in the role of your -- in your role as secretary to the comptroller?

[225] A. It's information I see across her desk and my desk.

Q. This would be part of the information that would be considered to be confidential information?

A. Right.

Q. Highly confidential correct?

A. Right. Right.

Q. Do you have the original of this document, Exhibit 24?

A. No.

Q. You made a copy of it from the original?

A. It's a copy, yes.

Q. You made the copy?

A. Yes.

Q. When did you make this copy?

A. There again, I have no specific date except it's got to be in the fall sometime in September, October of 1989.

Q. So you made this copy sometime in September or October of 1989, is that correct?

A. Right.

Q. And you took that copy home with you?

A. Right.

Q. Did you tell Ms. Stoneking that you were going to make a copy of this payroll ledger?

[226] A. No.

Q. Did you tell her you were taking a copy home with you?

A. No.

Q. Did you tell any representative of the *Banner* that you were making this copy?

A. No.

Q. Did you tell anybody you were going to take it home with you?

A. I told no one.

Q. You showed it to you husband; correct?

A. That's correct.

Q. And you showed it to your attorney; correct?

A. Yes, I have shown it to Mr. Terry.

A. Anybody else?

Q. No.

A. Did you show it to the EEOC?

A. No.

Q. Did you get this information off Ms. Stoneking's desk?

A. Ms. Stoneking gave it to me.

Q. She gave it to you?

A. Right.

Q. For what purpose?

A. She gave it to me to shred.

[227] Q. Excuse me?

A. She gave it to me to shred.

Q. She gave it to you to shred?

A. That's correct.

Q. Before you shredded it, you made a copy of it?

A. That's correct.

Q. And you took it home?

A. I took it home.

Q. Without anybody's knowledge?

A. I told no one.

Q. Do you think that you were authorized to make a copy of this document and take it home?

A. Probably not, but I did it for my protection.

Q. You did it in September of 1989?

A. Approximately the fall in September or October.

Q. You knew you weren't authorized to do that, didn't you?

A. I did it for my protection.

Q. No, ma'am. You knew your were not authorized to do that, didn't you?

A. MR. TERRY: That question has been asked and answered.

MR. WAYLAND: No, it hasn't been [228] answered.

THE WITNESS: Did I know I was authorized to do it?

Q. You knew you were not authorized to do it, didn't you?

MR. TERRY: To do what?

MR. WAYLAND: To make this copy of this document and take it home.

MR. TERRY: We'll stipulate that she was not authorized. She was not authorized.

THE WITNESS: No.

BY MR. WAYLAND:

Q. You were not authorized?

A. No.

Q. Did you copy any other payroll sheets other than the two pages that are Exhibit 24?

A. I don't think so. I think that was it.

Q. You may have; you just don't recall?

A. I don't recall at the moment. I don't know.

Q. Exhibit 25 is entitled Nashville Banner Publishing Company Profit and Loss Statement.

A. Yes.

Q. October 1989?

A. Yes.

[229] Q. And comparing to October 1988?

A. Right.

Q. This is also confidential information, is it not?

A. Yes.

Q. This is information that you had access to as a result of your position as secretary to Ms. Stoneking?

A. Yes. Ms. Stoneking gave it to me.

Q. She gave you this document?

A. Yes.

Q. She gave this document to you to shred, didn't she?

A. Right.

Q. Rather than shredding it, you made a copy of it; correct?

A. And shredded it. I shredded it and make a copy.

Q. You made a copy, and then you shredded what she gave you?

A. Right.

Q. And you took the copy home with you?

A. Right.

Q. You see the word "dividends" is underlined and then those circles. Is that your husband's?

A. Yes.

[230] Q. Once again, you were not -- you knew you were not authorized to copy and take this document home, didn't you?

A. Yes.

Q. But you did it anyway?

A. Yes.

Q. You didn't tell anybody at the *Banner* that you did it, did you?

A. I told no one. No one knew it but my husband and now Mr. Terry.

Q. Did you copy this document in approximately October of 1989?

A. Approximately. I do not know the date, but approximately.

Q. October or the first of November of 1989?

A. Approximately.

MR. TERRY: Well, the date on the document is October 30th, 1989.

BY MR. WAYLAND:

Q. So it was sometime after October 30, 1989?

A. Yes, it had to be. I don't know the specific date.

Q. Exhibit 26. Do you see that?

A. Yes.

Q. What is Exhibit 26?

[231] A. That's a memo from Elise to Irby on { }'s contract.

Q. { } meaning { }?

A. Yes.

Q. It's a handwritten note to Mr. Simpkins from Elise McMillan?

A. That's correct.

Q. Where did you get this copy?

A. That was in the personnel file in my office.

Q. Whose personnel file?

A. { }'s.

Q. So you took this out of { }'s personnel file?

A. That's correct.

Q. And you made a copy of it?

A. That's correct.

Q. When did you do that?

A. I've got to assume sometime after February 23rd, 1989.

Q. Why do you assume that?

A. Because I believe this letter that you have as Exhibit 27 goes with it because this had attachments to it.

Q. Exhibit 26 had attachments to it?

A. It had the letter to { }.

[232] Q. It says, "Attached is a copy of the contract given to { }."

A. Well, sorry. The contract is Exhibit 30, which went along with this.

Q. Just a moment. Do you recall what was attached to this Exhibit 26?

A. Yes. This had attachments, yes.

Q. But you don't recall what it was?

A. To the best of my knowledge, I think Exhibit 26, 30, 27 and 28 all went together.

Q. You took all of those documents out of { }'s personnel file?

A. That's correct.

Q. And you made copies of them?

A. Right.

Q. Did you tell anybody you were making those copies?

A. No.

Q. Then you took those copies home?

A. Right.

Q. And you showed them to your husband?

A. Just my husband.

Q. And you showed them to Mr. Terry?

A. Mr. Terry; right.

Q. And all of those documents were taken out of [233] { }'s personnel file and copied sometime in the spring of 1989; is that correct?

A. No, it was later than that. They weren't copied at the time this was typed up, which would have made it later than February 23rd. To the best of my recollection, I think it was closer to August 1989. It wasn't done when this memo went out around February 23rd because I had only transferred back where the personnel files were in March when I started working for Ms. Stoneking.

Q. Sometime around August of 1989 is when you --

A. The way I recollect, it was several months after the fact -- after February 23rd.

Q. So sometime roughly in the summer of 1989 is when you took these documents out of { }'s personnel file and made a copy of them and took them home?

A. Yes.

Q. And you knew you weren't authorized to make the copies and take those home, didn't you?

A. Yes.

Q. Why did you do that?

A. For my protection. For insurance purposes.

Q. From what?

A. I have begun to notice a subtle trend of [234] harassment, so I decided that I might take these as insurance.

Q. In the summer of 1989, you had --

A. Just a tinge of it.

Q. What did you -- give me specifically what you're relying upon to say that.

A. Well, I think the two hours sick leave problem. The hair appointment was before that. Just several little things that led me to believe --

Q. Well, tell me what they were. I want to know what they were, Ms. McKennon.

A. We've already gone over those.

Q. Tell me what in the summer of 1989 --

MR. TERRY: Wait a minute. That's a mischaracterization. She never said that she took -- two of the documents on their face had to be taken after November.

MR. WAYLAND: Counsel, we're talking about the documents relating to { }. She's testified she took them out and copied them in the summer of 1989. If you have an objection --

MR. TERRY: She said the earliest that could have been was August.

MR. WAYLAND: If you have an objection, make it. If not, quit coaching the witness.

* * *

[242] recall?

A. No, I do not think so.

Q. What insurance or protection do you think

this gave you, Ms. McKennon?

A. Highly confidential information.

Q. What insurance or protection to you think this highly confidential information gave you?

A. You never know.

Q. Tell me.

A. Highly confidential information. It's just good to have it.

Q. You took highly confidential information, didn't you?

A. Yes.

Q. And it was company information, wasn't it?

A. Yes.

Q. And you had access to that information because you were in a position of trust; isn't that true?

A. Ms. Stoneking gave it to me.

Q. You were in a position of trust monitoring the personnel files; isn't that true?

A. That's correct.

Q. And you took those documents out and copied them and took them home with you; is that right?

A. That's correct.

[243] Q. And you did it for your own benefit?

A. That's right.

Q. And you did it even though you knew you were not authorized do to it?

A. For my protection.

Q. And you didn't tell anybody you did it either, did you?

A. I should say not.

Q. How is this highly confidential information going to protect you, Ms. McKennon?

A. You never know. It's always --

MR. TERRY: If you can think of any specific thing --

THE WITNESS: I really can't.

MR. TERRY: Then that's it -- I don't know.

THE WITNESS: I don't know.

BY MR. WAYLAND:

Q. Can you give me any specific reason why you took this in the summer of 1989?

A. I've answered that for my protection.

Q. Give me any specific reason that you thought this was going to protect you about -- was going to provide protection to you in the summer of 1989.

A. When you see a trend of maybe harassment

* * *

[254] caught doing that you would be terminated?

A. Well, I would know that I'd be terminated had I told anybody, but I did not tell anybody. They were safe with me.

Q. Had you told anybody you had taken them home?

A. No. No one knew but my husband.

Q. No, ma'am, that's not my question. You knew

that if the company determined --

MR. TERRY: Objection. There is absolutely no way she could testify for what this company would do.

BY MR. WAYLAND:

Q. Did you understand that if the company, --

MR. TERRY: Same objection.

BY MR. WAYLAND:

Q. -- Mr. Simpkins, had found out that you had copied these documents and taken them home without permission, these confidential documents, that he would have terminate you?

A. No, I don't know that.

MR. TERRY: Objection.

BY MR. WAYLAND:

Q. Did you understand that?

MR. TERRY: Calls for speculation.

THE WITNESS: No. You'll have to ask [255] Simpkins on that.

BY MR. WAYLAND:

Q. Yes, ma'am, I will. But I'm asking you what you understood.

A. I understood that if I showed these documents to anybody, I would have been terminated. But they were safe.

Q. And you understood if you took them home, you would have been terminated?

A. No, I really didn't understand that because they were safe in the house.

Q. Ms. Stoneking.

MR. TERRY: Ms. McKennon.

THE WITNESS: They were not given to anybody else.

BY MR. WAYLAND:

Q. Ms. McKennon. You're right. Ms. McKennon. Just so it's clear, Ms. McKennon, it's your testimony that you thought you could take these confidential documents, make copies of them, sneak them out of the building, and that that wouldn't put your job in jeopardy if somebody at the company found out you had done that?

A. They were safe. Nobody --

Q. No, ma'am, that's not my question. Would you answer my question, please?

10
No. 93-1543

SUPREME COURT, U.S.
FILED
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In The
Supreme Court of the United States

October Term, 1994

CHRISTINE McKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

*On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit*

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the lower courts properly denied Petitioner any remedy given her admittedly serious misconduct, her concession that the doctrine of after-acquired evidence of wrongdoing applies to the facts of her case, and her inability to adduce any evidence of pretext.

TABLE OF CONTENTS

	<i>Page</i>
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. The Proceedings Below	1
B. Counter-Statement of the Facts	3
Summary of Argument	9
Argument	10
I. Petitioner's claims for compensatory damages and backpay for alleged discriminatory compensation are barred.	10
II. The applicability of the doctrine to Petitioner's misconduct is not in dispute.	11
A. The Circuits Considering the Doctrine Agree that Misconduct Limits Remedies.	11
B. The Facts and Proof in the Present Case Warrant a Bar to All Relief.	15
III. Application of the doctrine to bar all relief in certain circumstances springs from established legal and equitable doctrines.	22

Contents

	<i>Page</i>
A. The Constitutional Doctrine of Standing Operates to Deny Plaintiffs Any Relief.	23
1. Injury	24
2. Causal Connection Between the Injury and the Conduct Complained Of	29
3. Efficacy of a Remedy Directed Solely at the Complained-of Conduct	33
B. Plaintiff's Failure to Establish a Prima Facie Case Bars Relief.	35
C. The Doctrine of Unclean Hands Applies to Bar Relief.	40
IV. The arguments and authorities of Petitioner and her amici are inapplicable to the present case,	42
V. Summary judgment is an appropriate means of disposing of after-acquired evidence cases, especially the present case.	47
Conclusion	50

TABLE OF CITATIONS

Cases Cited:

<i>ABF Freight Sys. v. NLRB</i> , 114 S. Ct. 835 (1994)	40
---	----

Contents

	Page
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	24, 30, 33
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	47
<i>Anderson v. Savage Lab., Inc.</i> , 675 F.2d 1221 (11th Cir. 1982)	41, 47
<i>Arjay Assocs. v. Bush</i> , 891 F.2d 894 (Fed. Cir. 1989)	25
<i>Association of Data Processing Serv. Organiz., Inc. v. Camp</i> , 397 U.S. 150 (1970)	24
<i>Avant v. South Cent. Bell Tel. Co.</i> , 716 F.2d 1083 (5th Cir. 1983)	38
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	29
<i>Bobb v. Modern Prods., Inc.</i> , 648 F.2d 1051 (5th Cir. 1981)	45
<i>Bonger v. American Water Works</i> , 789 F. Supp. 1102 (D. Colo. 1992)	21
<i>Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Tx. R.R. Co.</i> , 363 U.S. 528 (1960)	35
<i>Browning-Ferris Indus. v. Kelco Disposal</i> , 492 U.S. 257 (1989)	11
<i>Bryson v. United States</i> , 396 U.S. 64 (1969)	25

Contents

	Page
<i>Burrafato v. United States Dep't of State</i> , 523 F.2d 554 (2d Cir. 1975), <i>cert. denied</i> , 424 U.S. 910 (1976)	25
<i>Calloway v. Partners Nat'l Health Plans</i> , 986 F.2d 446 (11th Cir. 1993)	44
<i>Carroll v. Board of Educ.</i> , 561 F.2d 1 (6th Cir. 1977), <i>cert. denied</i> , 435 U.S. 904 (1978)	31, 32
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	47
<i>Chambers v. Wynne Sch. Dist.</i> , 909 F.2d 1214 (8th Cir. 1990)	36
<i>Churchman v. Pinkerton's, Inc.</i> , 756 F. Supp. 515 (D. Kan. 1991)	19
<i>Clark v. Rose</i> , 531 F.2d 56 (2d Cir. 1976)	32
<i>Dennis v. United States</i> , 384 U.S. 855 (1966)	25
<i>Deweese v. Reinhard</i> , 165 U.S. 386 (1897)	40
<i>Diamond v. Charles</i> , 476 U.S. 54 (1986)	31
<i>Dotson v. United States Postal Serv.</i> , 977 F.2d 976 (6th Cir.), <i>cert. denied</i> , 113 S. Ct. 263 (1992)	12, 39
<i>Duke Power Co. v. Carolina Envtl. Study Group, Inc.</i> , 438 U.S. 59 (1978)	24, 29
<i>EEOC v. Farmer Bros. Co.</i> , 1994 U.S. App. Lexis 19788 (9th Cir. 1994)	12

Contents

	Page
<i>EEOC v. Recruit U.S.A., Inc.</i> , 939 F.2d 746 (9th Cir. 1991)	44
<i>Frey v. Ramsey County Community Human Servs.</i> , 517 N.W.2d 591 (Minn. Ct. App. 1994)	23, 27
<i>George v. Farmers Elec. Coop., Inc.</i> , 715 F.2d 175 (5th Cir. 1983)	30
<i>Gilty v. Village of Oak Park</i> , 919 F.2d 1247 (7th Cir. 1990)	38, 40
<i>Goldberg v. Bama Mfg. Corp.</i> , 302 F.2d 152 (5th Cir. 1962)	29, 46
<i>Guzman v. United Airlines</i> , 53 Fair Empl. Prac. Cas. (BNA) 1419 (D. Mass. 1990)	39
<i>Gypsum Carrier, Inc. v. Handelsman Maritime Carrier</i> , 307 F.2d 525 (9th Cir. 1962)	46
<i>Hargett v. Delta Automotive, Inc.</i> , 765 F. Supp. 1487 (N.D. Ala. 1991)	41, 44
<i>Harris v. Forklift Sys.</i> , 114 S. Ct. 367 (1993)	18
<i>Heckler v. Mathews</i> , 465 U.S. 728 (1984)	29
<i>Hotel & Restaurant Employees Union, Local 25 v. Smith</i> , 846 F.2d 1499 (D.C. Cir. 1988)	25

Contents

	Page
<i>Howard v. New Jersey Dep't of Civil Serv.</i> , 667 F.2d 1099 (3d Cir. 1981), <i>cert. denied</i> , 458 U.S. 1122 (1982)	31
<i>International Union, UAW v. Johnson</i> , 674 F.2d 1195 (7th Cir. 1982)	31
<i>Johnson v. Honeywell Info. Sys. Inc.</i> , 955 F.2d 409 (6th Cir. 1992)	3, 12, 17, 20
<i>Jones v. Cavazos</i> , 889 F.2d 1043 (11th Cir. 1989)	31
<i>Kay v. United States</i> , 303 U.S. 1 (1938)	25
<i>Keystone Driller Co. v. General Excavator Co.</i> , 290 U.S. 240 (1933)	40, 41
<i>Kristufek v. Hussmann Foodservice Co.</i> , 985 F.2d 364 (7th Cir. 1993)	12, 13, 14, 17, 48
<i>Landgraf v. USI Film Prods.</i> , 114 S. Ct. 1483 (1994)	40
<i>Linda R.S. v. Richard D.</i> , 410 U.S. 614 (1973)	29, 30
<i>Lorillard, Div. of Loew's Theatres, Inc. v. Pons</i> , 434 U.S. 575 (1978)	10
<i>Lujan v. Defenders of Wildlife</i> , 112 S. Ct. 2130 (1992) ...	23, 24
<i>Manufacturer's Fin. Co. v. McKey</i> , 294 U.S. 442 (1935) ..	40
<i>Mardell v. Harleysville Life Ins.</i> , 1994 WL 396512 (3d Cir. 1994)	12, 13, 14, 48

Contents

	Page
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	47, 49
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	35, 36, 38, 40
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 975 F.2d 302 (6th Cir. 1992), cert. dismissed, 114 S. Ct. 22 (1993)	3, 12
<i>Minneapolis, St. Paul & S. Ste. Marie R. Co. v. Rock</i> , 279 U.S. 410 (1929)	45
<i>Mitchell v. Trawler Racer, Inc.</i> , 362 U.S. 539 (1960)	44
<i>Molerio v. Federal Bureau of Investigation</i> , 749 F.2d 815 (D.C. Cir. 1984)	35
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	23
<i>Northeastern Fla. Contractors v. City of Jacksonville</i> , 113 S. Ct. 2297 (1993)	23, 24, 25, 26, 33
<i>O'Driscoll v. Hercules, Inc.</i> , 12 F.3d 176 (10th Cir. 1994), petition for cert. filed, 62 USLW 3799 (U.S. Apr. 1, 1994)	12, 17, 19, 20
<i>Omar v. Sea-Land Serv., Inc.</i> , 813 F.2d 986 (9th Cir. 1987)	46

Contents

	Page
<i>Paglio v. Chagrin Valley Hunt Club Corp.</i> , 1992 U.S. App. Lexis 15,399 (6th Cir. 1992)	12
<i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976)	31
<i>Petro-Chem Processing, Inc. v. EPA</i> , 866 F.2d 433 (D.C. Cir.), cert. denied, 490 U.S. 1106 (1989)	31, 37
<i>Pettway v. American Cast Iron Pipe Co.</i> , 411 F.2d 998 (5th Cir. 1969)	43
<i>Planned Parenthood Ass'n v. Kempiners</i> , 700 F.2d 1115 (7th Cir. 1983)	32
<i>Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.</i> , 324 U.S. 806 (1945)	40
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	11, 23, 26, 27, 29, 30
<i>Reed v. AMAX Coal Co.</i> , 971 F.2d 1295 (7th Cir. 1992) ...	12
<i>Reed v. Iowa Marine & Repair Corp.</i> , 143 F.R.D. 648 (E.D. La. 1992)	46
<i>Regents of Univ. of Calif. v. Bakke</i> , 438 U.S. 265 (1978) ..	25, 26
<i>Renne v. Geary</i> , 111 S. Ct. 2331 (1991)	33
<i>Rich v. Westland Printers</i> , 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993)	21

Contents

	Page
<i>Richmond v. Board of Regents</i> , 957 F.2d 595 (8th Cir. 1992)	35
<i>Robinson v. United States Air Force</i> , 635 F. Supp. 108 (D.D.C. 1986)	38
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	44
<i>Rogers v. Missouri Pac. R.R. Co.</i> , 352 U.S. 500 (1957) ...	44
<i>St. Mary's Honor Ctr. v. Hicks</i> , 113 S. Ct. 2742 (1993)	9, 34, 45, 49
<i>Securities & Exch. Comm'n v. National Sec., Inc.</i> , 393 U.S. 453 (1969)	35
<i>Simon v. Eastern Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976)	29, 30
<i>Smallwood v. United Air Lines, Inc.</i> , 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984)	38
<i>Smith v. General Scanning, Inc.</i> , 876 F.2d 1315 (7th Cir. 1989)	12
<i>Socony-Vacuum Oil Co. v. Smith</i> , 305 U.S. 424 (1938) ...	45
<i>Spinks v. United States Lines Co.</i> , 223 F. Supp. 371 (S.D.N.Y. 1963)	46

Contents

	Page
<i>Still v. Norfolk & W. Ry.</i> , 368 U.S. 35 (1961)	45, 46
<i>Summers v. State Farm Mut. Auto. Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	2, 11, 12, 20, 38
<i>Taylor v. Freeland & Kronz</i> , 112 S. Ct. 1644 (1992)	11
<i>Trentham v. K-Mart Corp.</i> , 806 F. Supp. 692 (E.D. Tenn. 1991), aff'd, 952 F.2d 403 (6th Cir. 1992)	1
<i>United States v. Kapp</i> , 303 U.S. 214 (1937)	25
<i>United States v. Knox</i> , 396 U.S. 77 (1969)	25
<i>United States v. McNeal</i> , 900 F.2d 119 (7th Cir. 1990) ...	31
<i>Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.</i> , 454 U.S. 464 (1982)	24
<i>Villa v. City of Chicago</i> , 924 F.2d 629 (7th Cir. 1991)	36
<i>Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.</i> , 429 U.S. 252 (1977)	29, 30
<i>Wallace v. Dunn Constr. Co.</i> , 968 F.2d 1174 (11th Cir. 1992)	12, 13, 14, 17, 20, 21, 23, 26, 27
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	29, 30
<i>Washington v. Lake County, Ill.</i> , 969 F.2d 250 (7th Cir. 1992)	12, 13

Contents

	Page
<i>Weiss v. Coca-Cola Bottling Co.</i> , 990 F.2d 333 (7th Cir. 1993)	35
<i>Welch v. Liberty Mach. Works</i> , 23 F.3d 1403 (8th Cir. 1994)	12, 14, 17, 23, 48
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	23
<i>Williams v. Boorstin</i> , 663 F.2d 109 (D.C. Cir. 1980), <i>cert. denied</i> , 451 U.S. 985 (1981)	36, 37, 38
<i>Women Employed v. Rinella & Rinella</i> , 468 F. Supp. 1123 (N.D. Ill. 1979)	41
<i>Woods v. Ficker</i> , 768 F. Supp. 793 (N.D. Ala. 1991), <i>aff'd without op.</i> , 972 F.2d 1350 (11th Cir. 1992)	41, 44
<i>Woods v. Milner</i> , 955 F.2d 436 (6th Cir. 1992)	31
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976)	11
Statutes Cited:	
29 U.S.C. § 621	1
29 U.S.C. § 623(f)(1-3)	43
29 U.S.C. § 623(f)(3)	28
33 U.S.C. § 904(b)	45

Contents

	Page
38 U.S.C. § 901, <i>et seq.</i>	44
42 U.S.C. § 2000e-2(m)	42
42 U.S.C. § 2000e-5(g)(2)(B)	42
45 U.S.C. § 51, <i>et seq.</i>	44
45 U.S.C. § 54	45
46 U.S.C. § 688	44
Tenn. Code Ann. § 4-21-101	1
Other Authorities Cited:	
Beale, <i>The Proximate Causes of an Act</i> , 33 Harv. L. Rev. 632 (1920)	32
W. Prosser, <i>Handbook of the Law of Torts</i> §§ 41, 238 (4th ed. 1971)	30, 32
13 C. Wright, A. Miller, & E. Cooper, <i>Federal Practice and Procedure</i> § 3531.5 (2d ed. 1984)	30, 31
W. Schwarzer, A. Hirsch, D. Barrans, <i>The Analysis and Decision of Summary Judgment Motions</i> , 139 F.R.D. 441 (1991)	47
<i>Additional Views of Mr. Javits, Mr. Prouty, Mr. Murphy, and Mr. Griffin</i> , reprinted in 1966 U.S.C.C.A.N. 3045-47	22

Contents

	Page
<i>Age Discrimination in Employment: Hearings Before the Sub Committee on Labor of the Committee on Labor and Welfare, 90th Cong., 1st Sess. 23-35 (1967)</i>	22
<i>Statement of President George Bush Upon Signing S. 1745, 27 Weekly Compilation of Presidential Documents 1701 (Nov. 25, 1991), reprinted in 1991 U.S.C.C.A.N. 768</i>	22
<i>U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964 (1965)</i>	22, 43
<i>H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 14-15 (1991), reprinted in 1991 U.S.C.C.A.N. 552-53</i>	22
<i>H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 24 (1991), reprinted in 1991 U.S.C.C.A.N. 717</i>	22
<i>H.R. Rep. No. 756, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 5628</i>	22
<i>H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 2213</i>	22, 43
<i>113 Cong. Rec. 31252-55 (1967)</i>	22, 27
<i>137 Cong. Rec. S15,233-35 (daily ed. Oct. 25, 1991)</i>	22
<i>137 Cong. Rec. S15,486 (daily ed. Oct. 30, 1991)</i>	22
<i>137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991)</i>	22

STATEMENT OF THE CASE

A. The Proceedings Below¹

On May 6, 1991, Petitioner filed suit in the United States District Court for the Middle District of Tennessee alleging that her discharge from employment with Respondent the Nashville Banner Publishing Co. ("the Banner")² violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101.³ (J.A. 5a). After Petitioner's responses to the Banner's requests for documents and Petitioner's deposition revealed that she had stolen proprietary and confidential documents from the Banner during her employment as a confidential secretary for the Banner's Comptroller, the Banner moved for summary judgment. (J.A. 17a). The grounds for the motion for summary judgment ("Motion") were that Petitioner's admission of theft and of its inevitable consequences left no genuine disputes of material fact. Specifically, the Motion posited that Petitioner's admission that she could and would have been discharged had the Banner known

1. For the sake of clarity, Respondent's Brief incorporates the following abbreviations in its citation of documents: "AFL.Br." = Amicus Brief of AFL-CIO; "Br.Op." = Brief in Opposition to Petition for a Writ of Certiorari; "Dock." = Docket; "EEOC Br." = Amicus Brief of EEOC; "J.A." = Joint Appendix; "NELA Br." = Amicus Brief of NELA & ATLA; "Pet." = Petition for a Writ of Certiorari; "P.A." = Petitioner's Appendix; "P.Br." = Petitioner's Brief on the Merits; "P.Dep." = Petitioner's Deposition.

2. The Banner is a closely held private corporation, with no parent or subsidiary company, in the business of publishing a daily newspaper known as the *Nashville Banner*.

3. Analysis of Petitioner's age discrimination claim under Tenn. Code Ann. § 4-21-101 is the same as under the ADEA. *Trentham v. K-Mart Corp.*, 806 F. Supp. 692 (E.D. Tenn. 1991), *aff'd*, 952 F.2d 403 (6th Cir. 1992).

of the theft, confirmed by the undisputed testimony of four of the Banner's principals, precluded Petitioner from any relief under the doctrine of after-acquired evidence of wrongdoing ("the doctrine"). (J.A. 18a-43a).

Petitioner sought and was granted an extension of time to respond to the Banner's Motion. (Dock. 12). Both before and during that time, Petitioner conducted discovery, including taking the depositions of the four Banner principals.⁴

After this discovery, Petitioner opposed the Banner's Motion by arguing that summary judgment should be denied because her wrongdoing was not serious enough to warrant termination.⁵ (J.A. 44a). The district court granted the Banner's Motion, finding that the undisputed facts revealed that the nature and materiality of Petitioner's misconduct provided "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge." (P.A. 17a).

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that, based on the facts of this case, the district court properly granted summary judgment. (P.A. 2a). Specifically, the Sixth Circuit relied on *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and two prior

4. Specifically, Petitioner's counsel deposed Irby C. Simpkins, Jr., President of the Banner and Publisher of the *Nashville Banner*; Edward F. Jones, Editor of the *Nashville Banner*; Imogene Stoneking, Comptroller of the Banner and Petitioner's direct supervisor; and Elise D. McMillan, General Counsel and Executive Vice President of the Banner.

5. Petitioner misstates the Banner's position regarding this issue. She states that the Banner "acknowledges" that there was a factual dispute about the gravity of her wrongdoing. (P.Br. at 6, 43). Contrary to this assertion, there never was a genuine dispute of material fact over the seriousness or consequences of her misconduct. See Counter Statement of the Facts, *infra*.

Sixth Circuit cases⁶ to hold that the doctrine applied to Petitioner's misconduct during her employment. (P.A. 4-8a). The Sixth Circuit specifically rejected Petitioner's argument that she was justified in having a "lever with which to resist" a possible discharge (P.A. 8a), noting that adoption of this theory would justify an employee's taking money from her employer to support herself in anticipation of unlawful discharge. (P.A. 9a).

In her Petition, Petitioner conceded the applicability of the doctrine but asked this Court to select the Eleventh Circuit's approach to the remedies available under the doctrine. (Pet. at 11). Now, Petitioner asks that the doctrine be modified to give her a jury trial on all issues and, for the first time, asks this Court to decide whether the doctrine may be used to limit compensatory damages for alleged retirement harassment or to bar back pay for "discrimination in compensation." (See P.Br. at 3, 8, 12, and 50).

B. Counter Statement of the Facts

In deciding the Motion, the district court viewed the facts in the light most favorable to Petitioner. Petitioner, in her statement of the facts in the Petition and in her brief on the merits, attempts to recast the facts as developed in the record. By omitting many material facts developed in the proceedings below and misstating other facts that are relevant to the disposition of this appeal, Petitioner has distorted the record. Accordingly, the Banner presents the facts as developed on the record.

6. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409 (6th Cir. 1992).

7. Because Petitioner failed to raise these matters below, they are barred by waiver. See I., *infra*.

Petitioner, an at-will employee, was one of nine employees laid off October 31, 1990, as part of a reduction in force the Banner instituted for financial reasons.⁸ (J.A. 13a, 57a). From March, 1989, through October 31, 1990, Petitioner held the position of secretary to Imogene Stoneking, the Banner's Comptroller.⁹ (J.A. 5a). Petitioner's duties in this position included maintaining personnel files, assisting in the preparation of the Banner's annual budget, processing time sheets, and doing various other tasks assigned to her by Ms. Stoneking. (J.A. 5a).

As secretary to the Comptroller, Petitioner had access to confidential documents and information, including payroll data, financial information, personnel files, and other confidential records. (Dock. 8). In her deposition, Petitioner admitted that she understood that all of this information was confidential and proprietary business information. (J.A. 132-33a). Petitioner also admitted that she understood that the Banner was relying upon her to safeguard the confidentiality of the business and proprietary information to which she had access as the Comptroller's secretary.¹⁰ (J.A. 132-33a). She further admitted knowing that she

8. Petitioner concedes that she was aware of the Banner's financial difficulty (Pet. at 4) but, in her brief on the merits, adds an incorrect gloss when she states that the Banner "repeatedly admonished Petitioner to retire," implying that the question of Petitioner's retirement came up more than once. (P.Br. at 3). In her deposition, however, Petitioner clarified that Petitioner was asked about her retirement plans once, and only once. (II P. Dep. at 62).

9. Contrary to her statement, Petitioner was not employed by the Nashville Banner Publishing Co. since May, 1951, but was employed by the Respondent in this case only since 1971. (J.A. 120a).

10. As the following deposition exchange demonstrates, Petitioner fully understood that her job dictated utmost confidentiality and trust:

A. You had to see confidential information when you worked for the comptroller.

Q. That was part of your job? A. That was part of my job.

(Cont'd)

was to keep this information strictly confidential and that the
(Cont'd)

Q. And you understood that was confidential information? A. I certainly did. I was a very confidential secretary. That's probably why — I was discreet; I was very confidential.

Q. And you understood your job required you to be confidential? A. That's right.

Q. Did you also understand that you should treat the information that you dealt with in connection in working for Ms. Stoneking as confidential? A. I did.

Q. And you understood that was proprietary business information? A. I did.

Q. You understood that it was not supposed to be disclosed? A. Yes.

Q. And you understood it was not supposed to be disclosed outside of the work place and people who were not authorized to know at the company? A. Yes.

Q. There wasn't any question about that in your mind, was there? A. I was a highly confidential secretary and discreet.

Q. And if you had violated those confidences and disclosed confidential information that you received as a result of your position as a confidential secretary, did you understand that you could be disciplined or discharged for that? A. I never did that. I didn't have that problem. My reputation was confidential and discreet, so that was no problem.

Q. But if you had done it, did you understand that you could have been discharged for that? A. I think anybody would have thought that.

Q. So you agreed with that and you understood that then? A. Yes.

Q. And the company had the right to rely upon you not to disclose that information? A. Yes.

(J.A. 117a-118a).

failure to do so could and would result in termination.¹¹ (J.A. 153-54a).

Thus, Petitioner knew that she held a position of trust with the Banner and understood her obligation to maintain the confidentiality of the information to which she was privy. Nevertheless, Petitioner admitted that she surreptitiously photocopied and removed from the Banner's premises sensitive financial documents and personnel records.

Specifically, the Banner discovered during Petitioner's deposition that, before she was laid off, Petitioner had copied the Nashville Banner Fiscal Period Payroll Ledger listing salaries and related information about the Banner's owners, management personnel, and administrative staff.¹² (J.A. 141-54a). She also copied the Nashville Banner Publishing Co.'s 1989 Profit and Loss Statement. (*Id.*).

11. "Well, I would know that I'd be terminated had I told anybody, but I did not tell anybody. They [the documents] were safe with me." (J.A. at 153a). "*I understood that if I showed these documents to anybody, I would have been terminated. But they were safe.*" (J.A. at 154a) (emphasis added).

12. Petitioner divulged to her husband and attorney confidential and proprietary salary information concerning the following individuals: Irby C. Simpkins, Jr., President of the Banner and Publisher of the *Nashville Banner*; Brownlee Currey, Chairman of the Board of the Banner; Elise D. McMillan, the Banner's General Counsel and Executive Vice President for Administration; Imogene Stoneking, Comptroller of the Banner; Edward F. Jones, Editor of the *Nashville Banner*; Jack Gunter, Director of Special Projects; and various secretaries. (J.A. 141-54a).

Although Petitioner tries to understate the severity of her misconduct, the Banner was forced to obtain a protective order in the district court in order to safeguard the proprietary and confidential information that Petitioner had put at the unfettered disposal of herself and her husband. (Dock. 6).

Petitioner admitted that in copying these documents she intentionally disobeyed the Comptroller's specific instructions to shred them. (*Id.*). Instead, she photocopied the documents for her own use. (*Id.*). Knowing full well the highly confidential nature of these documents and her duty to maintain their confidentiality, Petitioner removed them from the Banner's premises and shared the information with her husband. (*Id.*). Because Petitioner knew that she was not authorized to take and use these documents for her own purposes, she copied and removed them secretly, not telling the Comptroller or anyone else at the Banner that she had copied these documents or that she was removing them from the premises. (*Id.*).

In addition to the documents she had been instructed to shred, Petitioner secretly copied and removed from the Banner's premises several documents contained in the personnel file of a Banner manager. (*Id.*). Among these documents was a confidential agreement entered into between the Banner and the manager and a series of documents relating to that agreement. (*Id.*). Petitioner admitted that she understood she was not authorized to copy any of these documents, much less to remove them from the Banner's premises and share the contents with anyone. (*Id.*).

The first time the Banner became aware that Petitioner had secretly copied, removed, and shared confidential financial and personnel documents was during her deposition on December 18, 1991.¹³ (J.A. 18-21). Petitioner testified that she took these documents without authorization from and without asking anyone at the Banner, that she had been instructed to shred two of the documents she copied, and that she understood that these actions could and would subject her to termination. (J.A. 141-54a). In her deposition, she testified that the reason she copied and removed the

13. Petitioner produced these confidential and proprietary documents during discovery. The Banner did not know when, how, or why Petitioner obtained these documents until her deposition.

documents was for her "insurance" and "protection."¹⁴ (J.A. 145, 150a).

As a result of the discovery of Petitioner's misconduct, the Banner informed her by letter that her actions constituted deliberate misconduct involving breach of trust and confidentiality obligations essential to her position as a confidential secretary. (J.A. 37a). In this letter, in his affidavit, and in his deposition, the Banner's President stated that had the Banner been aware of Petitioner's breach of trust and misconduct at the time that it occurred or at any time thereafter the Banner would have terminated her immediately. (J.A. 35a; 37a; 55a). Similarly, in affidavits and again in deposition testimony, every other member of the Banner's management involved in Petitioner's employment stated unequivocally under oath that they would have terminated or recommended termination of Petitioner.¹⁵ (Dock. 8). Even though Petitioner's counsel conducted discovery and deposed each of these managers, she has not offered any rebuttal to their testimony.¹⁶ (P.A. 17a).

14. After producing the stolen documents in an apparent attempt to collect on her "insurance," Petitioner was faced with the Banner's motion. In an affidavit filed three months after her deposition to resist the Banner's Motion, Petitioner decided that her intent in taking the documents was to gain information about her job security concerns. (J.A. 48a). Further, long after the time for submitting errata changes had lapsed, in an attempt to evade the consequences of her admitted misconduct in her deposition, Petitioner submitted 60 pages of errata changes to her deposition, changing many answers from *yes* to *no* and from *no* to *yes*. (J.A. 93a-102a). The Banner's objections to Petitioner's effort to recast the facts was mooted by the district court's grant of the Motion.

15. Notwithstanding Petitioner's effort to minimize the undisputed proof presented by the Banner as to the consequences of her breach of trust (*see* P.Br. at 5-6), the most that her series of negatives establishes is that, in the past five years, the Banner has been unaware that any other employees engaged in such egregious misconduct.

16. Petitioner betrays a misunderstanding of summary judgment
(Cont'd)

SUMMARY OF ARGUMENT

Petitioner in this case is entitled to no relief under the doctrine, which has its genesis in other established legal and equitable rules.

First, Petitioner's claims for compensatory damages and backpay for alleged discrimination in compensation are barred by the ADEA and waiver. Second, petitioner concedes that the doctrine applies to her admitted and serious misconduct to limit other relief. Further, it is undisputed that she would have been fired for the misconduct had she not successfully concealed it. Thus, based on the undisputed facts of this case, summary judgment against Petitioner barring all relief was proper.

Third, the constitutional doctrine of standing along with her failure to establish a *prima facie* case and her admittedly unclean hands operates to bar Petitioner from any relief. Thus, based on established legal and equitable principles, the doctrine was properly applied to deny this ADEA Plaintiff any relief.

Finally, Petitioner's argument that she is due a remedy relies on inapplicable statutes and authorities. Thus, because Petitioner's authorities are inapposite, because there are no material disputed facts, and because the Banner fully met its burden of proving both objectively and subjectively that she would have been discharged, summary judgment was properly granted against Petitioner.

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procedure and of this Court's holding in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), regarding burden of proof when she states that whether her dismissal was inevitable "clearly" would be a jury issue. (P.Br. at 6). *See* Part V, *infra*, and discussion in Part II of Respondent's Brief in Opposition at 18-20.

ARGUMENT

The issue in this case is whether Petitioner's admittedly serious misconduct entitles her to a trial to seek money damages, even though it is undisputed that she received her full salary and benefits for over a year after she betrayed her employer's trust. Thus, even while admitting that she engaged in misconduct serious enough to warrant discharge, conceding that the doctrine applies to limit relief, and presenting no disputed material facts, Petitioner requests a trial to establish discrimination and to seek a panoply of relief, including compensatory damages and backpay for alleged discrimination in compensation. These requests are logically and legally untenable and should be rejected.

I.

PETITIONER'S CLAIMS FOR COMPENSATORY DAMAGES AND BACKPAY FOR ALLEGED DISCRIMINATORY COMPENSATION ARE BARRED.

Sensing that her claim for backpay is without merit, Petitioner now announces, for the first time in her brief on the merits, that she seeks compensatory damages for alleged retirement harassment and backpay for alleged "discrimination in compensation." Other than in her complaint, nothing in the record ever mentions these claims, and Petitioner has pointed to no record support. These specific requests for relief are barred by waiver and under the ADEA.

First, the ADEA does not provide for compensatory damages. *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 583 n. 11 (1978). Thus, on this ground alone, Petitioner's claim for compensatory damages is barred.

Second, Petitioner's claims for compensatory damages for

alleged harassment and backpay for alleged discrimination in compensation have been waived. Because Petitioner did not raise these claims earlier, neither the district court nor the Sixth Circuit addressed these claims. Further, they are not supported by arguments in the record and were not included in her Petition. Thus, because Petitioner waived these claims, they are not properly before this Court. *See Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("this Court does not decide questions not raised or resolved in the lower courts"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976)(per curiam)(same); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989)(same); *see also Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 277 (1989) (failure to raise argument before either of lower courts and failure to make specific mention of it in petition bar consideration).

Accordingly, Petitioner's belated claims for compensatory damages and backpay for alleged discrimination in compensation are barred.

II.

THE APPLICABILITY OF THE DOCTRINE TO PETITIONER'S MISCONDUCT IS NOT IN DISPUTE.

Petitioner concedes that the doctrine applies to her misconduct and admits that her misconduct was serious enough to warrant discharge. Nevertheless, Petitioner asks this Court to allow her a trial to seek the equitable remedy of backpay. The facts of this case fully justify barring any remedy to Petitioner.

A. The Circuits Considering the Doctrine Agree that Misconduct Limits Remedies.

Since the Tenth Circuit articulated the doctrine in *Summers*,

864 F.2d 700, the Sixth,¹⁷ Seventh,¹⁸ Eighth,¹⁹ and Eleventh Circuits²⁰ have applied the doctrine either to bar or to limit relief in certain circumstances.²¹ The rationale for barring any claimed remedy is that a plaintiff who engages in serious misconduct has suffered no injury caused by the employer. *Id.* 864 F.2d at 708. Adopting the reasoning of *Summers* that an employee's serious misconduct bars any claim to damages from the time of the misconduct forward, the Sixth Circuit held that summary judgment for the employer is proper where the employer can show that the nature and materiality of the wrongdoing would have led to immediate discharge. *Johnson*, 955 F.2d at 414; *see also O'Driscoll v. Hercules, Inc.*, 12 F.3d 176, 179 (10th Cir. 1994), *petition for cert. filed*, 62 USLW 3799 (U.S. Apr. 1, 1994) (No. 93-1728).

The Seventh and Eleventh Circuits agree that an employee's misconduct is relevant to the nature of a remedy in a subsequent

17. *Milligan-Jensen*, 975 F.2d 302; *Paglio v. Chagrin Valley Hunt Club Corp.*, 1992 U.S. App. Lexis 15,399 (6th Cir. 1992); *Dotson v. United States Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S.Ct. 263 (1992); *Johnson*, 955 F.2d 409.

18. *Smith v. General Scanning, Inc.*, 876 F.2d 1315, (7th Cir. 1989); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993).

19. *Welch v. Liberty Mach. Works*, 23 F.3d 1403 (8th Cir. 1994).

20. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992).

21. *Cf. Mardell v. Harleysville Life Ins.*, 1994 WL 396512 (3d Cir. 1994) (holding that separate trials necessary, one for liability and second for relief, and that doctrine relevant only at relief stage); *EEOC v. Farmer Bros. Co.*, 1994 U.S. App. Lexis 19788 (9th Cir. 1994) (refusing to reach merits of defense because raised for first time on appeal but observing that material employment application fraud could limit relief, depending on all facts and circumstances).

discrimination lawsuit. *See Kristufek*, 985 F.2d 364; *Wallace*, 968 F.2d 1174.

The Seventh Circuit — after holding that the doctrine applied on summary judgment to bar all relief in *Washington*, 969 F.2d at 256-57 — determined in *Kristufek* that a jury finding of retaliation and the employer's failure to prove it would have fired the plaintiff precluded a complete bar to backpay. *Kristufek*, 985 F.2d at 370. However, under the facts of the case before it, the court in *Kristufek* ordered a reduction in the jury's award of backpay for the time after the plaintiff's fraud was discovered. *Id.* at 371.

Two of the judges on the Eleventh Circuit panel in *Wallace* agreed that after-acquired evidence is relevant to the relief due a successful discrimination plaintiff in order to preserve an employer's rights to make decisions:

A sufficient showing of after-acquired evidence mandates the drawing of a boundary between the preservation of the employer's lawful prerogatives and the restoration of the discrimination victim. To be sure, the boundary will vary depending on the facts of each case. Therefore, the effect of after-acquired evidence on Title VII remedies is best decided on a case-by-case basis.

968 F.2d at 1181 (footnote omitted).

Based on the facts before the court in *Wallace*,²² the majority

22. Other circuits deciding that a bar to all relief was inappropriate reviewed factual scenarios involving direct evidence of discrimination, limited or immaterial application misrepresentations, and/or limited proof of the employer's actions in response to the fraud. *See, e.g., Mardell*, 1994 W.L.

decided that reinstatement and front pay were inappropriate remedies because the plaintiff's application fraud gave the employer a legitimate reason to discharge the plaintiff. However, the court determined that "the boundary" between the employer's and employee's interests shifted to disallow the plaintiff's backpay period to terminate prematurely unless the employer were able to prove "that it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation." 968 F.2d at 1182.

The court in *Wallace* rejected the approach adopted in *Kristufek*, which was to end the backpay period at the time the employer actually discovered the wrongdoing. *Id.* Thus, the employer's motion for summary judgment in *Wallace* was denied because the employer had no evidence showing when it would have discovered the fact that the plaintiff had failed to reveal her criminal conviction.²³

Notwithstanding the fact that Petitioner here concedes that the doctrine applies to her misconduct and admits that her misconduct was serious enough to warrant and would have led to discharge, she urges that she be allowed a trial and allowed to seek unlimited backpay under the formula fashioned by the court in *Wallace*. In short, Petitioner is asking this Court to force a trial on undisputed facts and to force the Banner to prove when it would have discovered her surreptitious copying and theft while she was

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396512 (direct evidence and single employer affidavit); *Kristufek*, 985 F.2d 364 (direct evidence and no proof that employer would have fired); *Welch*, 23 F.3d 1403 (direct evidence and single affidavit).

23. Defendant's petition for rehearing *en banc* has been pending in the *Wallace* case since September, 1992.

employed in order to foreclose her from seeking backpay. This position is untenable.²⁴

B. The Facts and Proof in the Present Case Warrant a Bar to All Relief.

Petitioner's misconduct fully warrants a complete bar to any relief. While serving as confidential secretary to the Comptroller, she secretly copied confidential, proprietary information. Petitioner then removed the documents from the Banner's premises and shared the contents with at least her husband and attorney.

Petitioner admitted knowing that this information was to be kept strictly confidential and that her failure to do so could and would result in her termination. She also admitted that she intentionally disobeyed the Comptroller's specific instructions to shred some of the documents. Petitioner also testified under oath that she secretly copied and took confidential documents from a manager's personnel file, including information about the manager's salary and related matters. Petitioner did not have permission to take any of these documents.

Compounding the betrayal of trust is Petitioner's reason for her theft. In her deposition, she testified that she copied and stole the documents for "insurance" and "protection."²⁵ Her attorney

24. As Petitioner's Reply Brief in support of the Petition concedes, under the facts of this case where Petitioner successfully concealed her theft until it suited her purposes to reveal it, the Banner's ability to prove exactly when Petitioner's theft would have come to light would be "highly dubious." It is undisputed that the documents were under Petitioner's and her husband's unfettered control. Thus, had Petitioner not produced the stolen documents during discovery, the Banner would likely not know to this day that she had betrayed her trust while serving as a confidential secretary.

25. Only after the Banner filed its Motion, did Petitioner try to alter her

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admitted in oral argument on the Banner's Motion that she stole the documents for insurance, and the district court rhetorically characterized her motive as blackmail. (Dock. 60, at 44). The district court found Petitioner's misconduct to be both undisputed and sufficiently gross to warrant application of the doctrine to bar all relief:

The Court does not hold that any or all misconduct during employment constitutes just cause for dismissal or serves as a complete defense to a wrongful discharge action. The Court concludes, however, that Mrs. McKennon's misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge.

(P.A. 16a-17a).

The Sixth Circuit agreed that the doctrine was properly applied to bar relief in view of the nature and materiality of Petitioner's admitted wrongdoing and the undisputed proof that the Banner would have fired her for her betrayal of trust.

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testimony by creating a sham affidavit and offering wholesale changes to her deposition. In making these changes, Petitioner attempted to justify her misconduct by suggesting that her breach of trust was in response to her job-security concerns. (See J.A. 48a; 93a-114a). The district court properly rejected her after-the-fact rationalization for her misconduct as irrelevant. (P.A. 17a). Although Petitioner references this rationalization in her brief, she does concede that "some circumstances" would warrant rejection of the "devil-made-me-do-it" argument. (See generally P.Br. at 37).

The circuits applying the doctrine to bar relief have articulated a high standard of proof that employers must meet on a motion for summary judgment to show that a discrimination plaintiff is entitled to no relief. See, e.g., *Johnson*, 955 F.2d at 414 (the evidence must establish valid and legitimate reason for termination); *Wallace*, 968 F.2d at 1181 n.11 (employer bears burden of persuasion to show by preponderance of evidence whether and how misconduct would alter employment relationship); *Kristufek*, 985 F.2d at 370 (proof by a preponderance of evidence that employer would have fired the plaintiff); *O'Driscoll*, 12 F.3d at 179 (proof that misconduct would have justified discharge and that employer would have discharged the plaintiff); *Welch*, 23 F.3d at 1405 (single self-serving affidavit insufficient to meet employer's burden).

This articulation of the employer's proof boils down to a three-part test, which this Court should adopt for purposes of determining whether an employer should prevail on a motion for summary judgment:

- (1) the undisputed material facts must establish serious wrongdoing related to employment;²⁶
- (2) the employer must show that the misconduct constitutes a valid and legitimate reason for discharge, i.e., that discharge is objectively reasonable;²⁷ and

26. Petitioner frets that "imperfect employees" will be denied protection under the discrimination laws. (P.Br. at 22). In the present case, the gravity of Petitioner's misconduct is well beyond mere imperfection. Furthermore, the requirement that the conduct be serious and employment related erases the concern for "imperfect employees." Finally, Petitioner's claim that federal judges are incapable of making the distinction between minor and serious misconduct (P.Br. at 28, 47-48) defies reason and experience and is insulting to the federal judiciary.

27. Petitioner's discussion of "objective evidence" (P.Br. at 44-45)
(Cont'd)

(3) the employer must prove subjectively that it would have terminated the employee had the misconduct been discovered.²⁸

The proof in the present case meets all three prongs. First, the material facts in the present case are undisputed. Petitioner testified that as a confidential secretary she was entrusted to safeguard her employer's confidential and proprietary information. She testified that she breached her employer's trust by copying and disclosing the information to unauthorized persons and that she breached that trust to serve her own purposes. Petitioner admitted that her misconduct was serious and job related and that she knew she could and would have been discharged had she been caught copying and removing this information. Therefore, the material undisputed facts establish conclusively the effect of her wrongdoing on her employment status.²⁹

Second, in addition to Petitioner's understanding of the

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paradoxically boomerangs. Not only did Petitioner's counsel try and fail in depositions to show that Petitioner would not have been fired for her misconduct, but also Petitioner herself conceded that she would have been fired. Petitioner's question regarding assessment of the defense based on after-acquired evidence of wrongdoing is easily answered. What would have occurred had the Banner not discharged Petitioner, had harbored no "impermissible motive," and had known about her betrayal of trust is beyond cavil: she would have been fired on the spot.

28. This three-part test fully comports with Rule 56 of the Federal Rules of Civil Procedure and with this Court's articulation of an objective and subjective standard of proof in *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

29. Petitioner is uncertain as to where the effect of her misconduct, viz-a-viz the Sixth Circuit's embezzler hypothetical and an employee's denunciation of a supervisor who assaulted her, "falls." (P.Br. at 37-38). Neither the Banner nor any other reasonable employer would have any doubt that Petitioner's misconduct pegs the embezzler side of the continuum.

inevitable result of her actions, immediate discharge based on her breach of employment trust is objectively reasonable. Put simply, courts have agreed that some kinds of employee misconduct warrant immediate termination. *See, e.g., Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515, 521 (D. Kan. 1991) (reasonable employer in security service business would not have hired or would have terminated plaintiff after discovering true facts of her employment and personal history); *O'Driscoll*, 745 F. Supp. 656, 659 (D. Utah 1990), ("it simply strains credulity to accept that any reasonable management personnel would have done otherwise [terminated the plaintiff] had they known of her misrepresentations"), *aff'd*, 12 F.3d 176 (10th Cir. 1994). Thus, even if Petitioner had not conceded that her breach of trust would in fact have led to her immediate and justified discharge had she not successfully concealed her theft, there can be no dispute that any reasonable employer would have terminated an employee under the circumstances that the present case presents.³⁰

Third, the evidence is undisputed that the Banner would in fact have discharged Petitioner. Immediately upon discovery of her theft, the Banner's President wrote to Petitioner that her misconduct was cause for immediate discharge. Moreover, affidavits submitted by four of the Banner's principals state that they would have discharged Petitioner or recommended her discharge had they known of her breach of trust. Finally, and contrary to Petitioner's implication that the Banner relied only on affidavits, after the Banner filed its Motion based on the letter and the affidavits, Petitioner sought and was granted an extension of time to conduct further discovery, including deposing all four of the Banner's principals. This discovery and these depositions merely confirmed the earlier evidence that Petitioner would have been terminated immediately upon discovery of her theft.

30. It goes without saying that if discharge is objectively reasonable, no reasonable jury would find otherwise.

This case contains no evidence of employer misconduct that has concerned some courts. *See, e.g., Johnson*, 955 F.2d at 414 (proof that employer would have discharged employee necessary to avoid after-the-fact rummaging through employees' personnel files to find trivial, non-material misconduct).³¹ In the present case, the Banner had no knowledge of Petitioner's theft until she herself revealed it by gratuitously producing the stolen documents. The Banner had no knowledge that Petitioner had systematically copied and removed the documents for her "protection" and "insurance" until her deposition.

None of the "parade of horrors" hypothesized by the Eleventh Circuit in *Wallace* is present here. The court in *Wallace* believed that the doctrine "invites employers to establish ludicrously low thresholds for 'legitimate' termination" and to "sandbag" an employee by hiring a woman knowing reasons not to employ her, concealing the knowledge, discriminating against her, and "discovering" the concealed knowledge to defend against a discrimination lawsuit. *Wallace*, 968 F.2d at 1180-81. This hypothetical is neither reasonable nor realistic. For one thing, the three-part test articulated above fully protects against such hypothetical abuses. Second, the facts of the present case contain no evidence of such employer machinations and abuse.³² Here,

31. Petitioner mistakenly attributes the masquerading physician hypothetical to *Johnson*. (P.Br. at 29 n.34). In fact, the court in *Summers* discussed the masquerading doctor hypothetical. *See* 864 F.2d at 708. The present case presents an analogous but non-hypothetical situation: the employee who masquerades as a confidential secretary.

32. The brief of the Women's Legal Defense Fund, *et al.*, misstates by omission the material facts in many of the cited cases by repeatedly minimizing both the misconduct of the alleged victims and the grounds for granting summary judgment. For example, by ignoring the subsequent history of *O'Driscoll*, 745 F. Supp. 656, *aff'd*, 12 F.3d 176 (10th Cir. 1994), the amici fail to note that the plaintiff's misdeeds included insurance fraud and a felony; the

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only Petitioner's skill at concealing her wrongdoing prevented the Banner from knowing about it until Petitioner chose to use the documents for her own purposes after the lawsuit was filed.³³

Indeed, the hypothetical provided by the two judges in *Wallace* compels a flawed result. Petitioner highlights this flaw when she concedes that the doctrine properly bars reinstatement and front pay. Taken to its logical conclusion, the "sandbagging" hypothetical would prevent *any* application of the doctrine to limit relief. However, the two judges in *Wallace*, who believed that a complete bar to backpay was inappropriate, held that the doctrine was properly applied to deny reinstatement and front pay to the plaintiff, 968 F.2d at 1184,³⁴ a proposition that Petitioner concedes. (P.Br. 13, 50).

amici fail to include an independent ground for summary judgment that the court in *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993), describes as "meritorious" and "most persuasive"; and the amici ignore the fact that relief to the plaintiff in *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992), was also denied because of the plaintiff's unauthorized copying of confidential documents.

33. Petitioner herself engaged in sandbagging by withholding the documents in her EEOC charge. (J.A. 144a).

34. A second obvious flaw to the majority's position in *Wallace* is that expecting employers to prove when they would have discovered concealed misconduct is objectively untenable. Under this construct, employees who are skilled at covering up theft or fraud would be rewarded with backpay during the time of the employees' successful stealth. Conversely, employers that cannot establish a time certain when they would have discovered the concealed wrong would be punished for their inability to detect it. The present case presents just such a problem. *See* note 24, *supra*. To impose a burden of resolving when, if, and how a hypothetical discovery would have occurred is not warranted under the three-part test posited above or under the facts of this case.

III.

APPLICATION OF THE DOCTRINE TO BAR ALL RELIEF IN CERTAIN CIRCUMSTANCES SPRINGS FROM ESTABLISHED LEGAL AND EQUITABLE DOCTRINES.

Petitioner's reliance on other federal laws is misplaced, and her argument that the timing of discovery of her misconduct somehow warrants relief is contrary to established law. First, this lawsuit is brought under the ADEA, not any other federal compensatory law or the NLRA.³⁵ Beginning with passage of the ADEA and concluding most recently with the passage of the Civil Rights Act of 1991, Congress has treated the ADEA differently from even Title VII.³⁶ Second, the facts of the present case make the prospect of rewarding Petitioner with any monetary relief as unthinkable as allowing bank tellers who successfully embezzle to seek backpay and compensatory damages because their skills at

35. See discussion at IV, *infra*.

36. See *Age Discrimination in Employment: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 23-35 (1967); H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 14-15 (1991), reprinted in 1991 U.S.C.C.A.N. 552-53; H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 24 (1991), reprinted in 1991 U.S.C.C.A.N. 717; *Statement of President George Bush Upon Signing S. 1745*, 27 Weekly Compilation of Presidential Documents 1701 (Nov. 25, 1991), reprinted in 1991 U.S.C.C.A.N. 768; H.R. Rep. No. 756, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 5628; H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 2213; *Additional Views of Mr. Javits, Mr. Prouty, Mr. Murphy, and Mr. Griffin*, reprinted in 1966 U.S.C.C.A.N. 3045-47; U.S. Dep't of Labor, *Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964* (1965); 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991)(remarks of Rep. Edwards); 137 Cong. Rec. S15,486 (daily ed. Oct. 30, 1991)(remarks of Sen. Kohl); 137 Cong. Rec. S15,233-35 (daily ed. Oct. 25, 1991)(remarks of Sen. Kennedy); 113 Cong. Rec. 31253-55 (1967)(remarks of Sen. Yarborough and Sen. Javits).

hiding their theft delayed or precluded discovery of the theft. As the following shows, the most basic principles of standing and the maxims of equity foreclose any relief to plaintiffs guilty of serious on-the-job misconduct who claim that they suffered subsequent employment discrimination.³⁷

A. The Constitutional Doctrine of Standing Operates to Deny Plaintiffs Any Relief.

The first of these doctrines is the constitutional requirement of standing. See *Wallace*, 968 F.2d at 1185 (Godbold, J., dissenting); *Frey v. Ramsey County Community Human Servs.*, 517 N.W.2d 591, 598 (Minn. Ct. App. 1994).

"[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). To establish standing, a party must demonstrate three elements: (1) injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). "These elements are the 'irreducible minimum' . . . required by the Constitution." *Northeastern Fla. Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2302 (1993) (quoting *Valley*

37. Although Petitioner relies on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), some courts and Petitioner's amici have criticized grounding the doctrine on the rationale behind the mixed-motive construct in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and its progeny. The court in *Summers* found the mixed-motive rationale a useful means of analysis, and other courts have been likewise persuaded. See, e.g., *Welch*, 23 F.3d at 1405. But see *Wallace*, 968 F.2d at 1179-80. Regardless of whether this Court decides that the mixed-motive analysis is or is not a proper underpinning for the doctrine, other and older decisions by this Court provide clear precedent for barring all relief to some plaintiffs, such as Petitioner, claiming injury.

Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).³⁸

Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 112 S. Ct. at 2136. Further, the requirement is jurisdictional and, thus, may be raised at any time. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 68 (1978).

Applying the test to the facts of this case illustrates both the constitutional grounding of the after-acquired evidence doctrine and Petitioner's lack of standing.

1. Injury

Injury, for these purposes, is the "invasion of a legally protected interest." *Northeastern Fla. Contractors*, 113 S. Ct. at 2302; *Lujan*, 112 S. Ct. at 2136.³⁹ Accordingly, standing initially depends on whether the right asserted by a plaintiff is one the law is prepared to recognize.⁴⁰ Not all are.

38. Although this Court has recognized additional, prudential limitations on standing, the "core component" of the standing doctrine is "derived directly from" Article III of the Constitution, which limits the federal courts to adjudication of "Cases" and "Controversies." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

39. The injury must also be concrete, particularized, and actual or imminent. *Id.*

40. This aspect of injury-in-fact resembles but is narrower than the prudential "zone of interests" test applied in *Association of Data Processing Serv. Organiz., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

An illegal alien, for example, has no right to avoid detection and deportation, and, thus, no standing to challenge deportation procedures. See *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1518 (D.C. Cir. 1988) (Silberman, J., writing for half of an equally divided *en banc* court); *Burrafato v. United States Dep't of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976). Likewise, an importer has no right to continued importation of a congressionally excluded product and, thus, lacks standing to challenge the exclusion. *Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989). These are cases in which, in the *Arjay* court's apt description, "appellants lack standing because the injury they assert is to a nonexistent right." *Id.*

Injury is equally lacking in cases where the plaintiff asserts a valid legal right but is disqualified from relying on it. Illustrative is a line of cases in which the Court denied standing to persons who fraudulently attempted to evade a statutory requirement and then sought to challenge the constitutionality of the requirement they had evaded. See *Bryson v. United States*, 396 U.S. 64, 68-72 (1969); *United States v. Knox*, 396 U.S. 77, 78-83 (1969); *Dennis v. United States*, 384 U.S. 855, 864-67 (1966); *Kay v. United States*, 303 U.S. 1, 6 (1938); *United States v. Kapp*, 303 U.S. 214 (1937); "[I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked." *Bryson*, 396 U.S. at 72.

In the present case, the injury Petitioner claims to have suffered is loss of employment as a result of alleged age discrimination. The question is whether Petitioner's continued employment after her misconduct is legally protected.⁴¹ Was

41. The AFL-CIO relies on *Northeastern Fla. Contractors* and *Bakke* for the proposition that there is an injury in fact merely from being subjected to a discriminatory policy and suggests that this stigmatic injury is enough to support a cause of action under the ADEA even in the absence of economic injury.
(Cont'd)

Petitioner legally entitled to continued employment by the Banner? Did Congress, in passing the ADEA, intend to protect employees who have obtained or maintained their employment through fraud and deceit? If not, Petitioner has suffered no invasion of a legally protected interest and, consequently, no judicially cognizable injury.

This rationale is the basis on which Judge Godbold would have denied standing to the plaintiff in the *Wallace* case:

I would hold that within the meaning of Title VII and the Equal Pay Act plaintiff is not a member of the affected group allegedly discriminated against and is not an "aggrieved" person. Put differently, Congress did not intend that under the circumstances of this case a plaintiff is within the protected class. Her status does not give her standing to sue. In traditional standing language she is not in the "impact area." She purports to be, but the status that would place her there was fraudulently obtained and but for her fraud would have been denied.

* * *

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Northeastern Fla. Contractors, 113 S. Ct. at 2297; *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). AFL Br. at 13-14 & n.12. *Northeastern Fla. Contractors* and *Bakke*, however, held only that the loss of opportunity to compete equally for a benefit is itself a cognizable injury. 113 S. Ct. at 2297; 438 U.S. at 265. Neither allowed standing based solely on stigmatic injury. As for the argument that the ADEA contemplates intangible injuries, the statute does not support this position, which has been rejected in the context of Title VII: "Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind." *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring).

There is no dispositive magic in the word "employee" or in having one's name on the payroll.

968 F.2d at 1187-88 (Godbold, J., dissenting).⁴² Any other result imputes to Congress an intent to protect the fruits of fraud. First, it would be anomalous to allow someone whose fraud went undetected to seek damages but to disallow damages to a plaintiff in a mixed-motive case when the employer proves the same decision would have been made anyway. *See Price Waterhouse*, 490 U.S. at 242. Even though the ADEA and Title VII are separate statutes, the congressional intent to preserve the employer's right to rely on trustworthy individuals is evident. *See id.*; *see also* 113 Cong. Rec. 31252, 31253 (1967) (Senator Yarborough's comment

42. Judge Godbold, as did the Minnesota Court of Appeals in *Frey*, distinguished between an employee who was not qualified and who would not have been hired absent a fraudulent misrepresentation and an employee who was qualified when hired but later engaged in misconduct justifying termination. For reasons that are less than clear, both limited their standing analysis to the former. 968 F.2d at 1185; 517 N.W.2d at 598. Conceptually there is no reason to distinguish between the two situations. A person who has *maintained* a job through fraud is outside the congressional intentment just as much as someone who *obtained* a job through fraud. They are equally undeserving of congressional or judicial solicitude. It may well be harder to establish the fact and timing of discharge for post-hiring misconduct, but this just means that employers will be harder pressed to establish a valid standing objection in such cases. That is not a reason to disallow the defense to employers, such as the Banner, who are able to meet this proof and establish conclusively that the employee would have been fired anyway. *See*, discussion at I.B. *supra*.

The court in *Frey* mentioned only the possibility of employers' rummaging through employment records to find nondiscriminatory reasons for discharge as a basis for the distinction. Other than the greater potential for employee misconduct in an ongoing employment relationship, there is no apparent connection between the two. This fear is, in any event, greatly exaggerated and unpersuasive for the reasons cited by Judge Godbold. *See* 968 F.2d at 1189.

that individuals cannot "hide behind" age to stay employed if there are disciplinary reasons that disallow continued employment).

Second, although the ADEA protects actual and prospective employees in their legitimate expectations of employment, the ADEA specifically excludes individuals who by their own actions forfeit their right of employment.⁴³ In this respect, an employee who knowingly engages in discharge-worthy misconduct is no different than an employee who never applied or who voluntarily resigns. Such persons are simply not protected individuals under the statute and cannot properly be considered injured by the loss of their putative employment.

The AFL-CIO avoids this proposition by advocating a "functional" rather than a "normative" definition of "employee" as one who "perform[s] economically-useful [sic] work . . . and [is] paid for so doing," on grounds that such definitions are the norm in some federal legislation. (AFL Br. at 6). "[T]he question whether or not a person is an employee is not for legal purposes generally confused with the question whether that person is *properly* an employee." *Id.* at n.3. This argument, however, begs the question of what Congress intended with respect to the ADEA, which specifically approves good-cause discharge. See 29 U.S.C. § 623(f)(3).

The AFL-CIO would have the Court treat a rotten apple just like any other apple, merely because it looks like the other apples. A person who discovers a rotten apple in his cellar has the right to throw it out and owes the apple no additional consideration for the time it sat there looking for all the world like a normal apple. Even if the apple were thrown out for other reasons and only later revealed itself to have been rotten, it has no standing to complain.

43. See 29 U.S.C. § 623(f)(3) (specifying that discharge for good cause is not unlawful).

Congress, we submit, did not intend to protect rotten apples. See, e.g., *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152, 156 (5th Cir. 1962) ("an employer should not have to keep a bad apple in the barrel.")

2. Causal Connection Between the Injury and the Conduct Complained Of

The injury complained of must be one "that fairly can be traced to the challenged action of the defendant." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). In practice, this requirement has meant that the challenged conduct must be a but-for cause of the injury.⁴⁴ Although the terminology differs, the cases show consistent application of this principle. Compare *Heckler v. Mathews*, 465 U.S. 728, 741 n.9 (1984); *Duke Power Co.*, 438 U.S. at 74-78; and *Barlow v. Collins*, 397 U.S. 159, 162-63 (1970) (upholding standing where the challenged conduct was a but-for cause of the injury) with *Simon*, 426 U.S. at 45 n.25; *Warth v. Seldin*, 422 U.S. 490, 506-07 (1975); and *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973) (denying standing where the challenged conduct was not a but-for cause of the injury).⁴⁵

Where the causal connection between conduct and injury is uncertain, the plaintiff must demonstrate a "substantial likelihood" that the conduct complained of was a but-for cause of the injury. *Duke Power*, 438 U.S. at 74, 77. See *Village of Arlington Heights v.*

44. A but-for cause is one without which the result in question would not have occurred; it is a necessary condition, though not necessarily a sufficient one. See, e.g., *Price Waterhouse*, 490 U.S. at 283 (Kennedy, J., dissenting).

45. This is, in a sense, an unavoidable result if the concept of causation is to have any content at all. If something is not a but-for cause of an event, "then by definition it did not make a difference to the outcome. The event would have occurred just the same without it." *Price Waterhouse*, 490 U.S. at 283 (Kennedy, J., dissenting).

Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977) ("substantial probability"); *Warth*, 422 U.S. at 504 ("substantial probability"). Causation is not established if the link between conduct and injury is "weak" and "speculative," subject to many intervening causes, making a but-for causal connection merely a "remote possibility." *Allen*, 468 U.S. at 757-59; *Simon*, 426 U.S. at 42-45; *Warth*, 422 U.S. at 504-07; *Linda R.S.*, 410 U.S. at 617-18 (1973).

An important corollary is that "an independent and sufficient cause in sources other than the matters complained of by the plaintiff" prevents the plaintiff from establishing the necessary causal link and, thus, defeats standing. 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.5, at 450 (2d ed. 1984). An injury is not "fairly traceable" to the defendant's conduct if it "results from the independent action of some third party." *Simon*, 426 U.S. at 41-42.⁴⁶

46. The plurality in *Price Waterhouse* objected to application of the but-for test of causation based on the theoretical anomaly that if an event has two independent and sufficient causes, neither is individually a but-for cause of the event. 490 U.S. at 241. This objection might have some force if both actors are negligent and liability must be assigned to at least one of them in order to vindicate the social policies of deterrence and just compensation. This problem of "overcausation" has generally been resolved in the tort context by allowing the jury to assign responsibility to any cause that was a "substantial factor" in bringing about the injury. See generally W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). This solution, however, is neither necessary nor justifiable where at least one of the causes is lawful and, thus, beyond the ability of the law to prevent. Where no act or omission that a court is authorized to compel could have changed the outcome, the harm was, in the eyes of the law, inevitable. In that case, the but-for test applies with full force to relieve the concurrent causal agent of liability. See, e.g., *George v. Farmers Elec. Coop., Inc.*, 715 F.2d 175, 178 (5th Cir. 1983) (wife had no standing to challenge discriminatory portion of her former employer's nepotism policy when she would have been discharged under concededly valid portion of policy).

This rule is even more applicable when the independent cause of a plaintiff's alleged injury is her own conduct. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 69-70 (1986) (intervenor had no standing to challenge law allowing award of attorney's fees because it was his own decision to intervene that exposed him to liability); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (denying states standing to complain about loss of tax revenues attributable to their own laws); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir.) (R.B. Ginsburg, J.) (voluntary choice of unsafe disposal methods was not caused by lax EPA regulation of hazardous waste), *cert. denied*, 490 U.S. 1106 (1989). In each of these cases, the injury was "self-inflicted" and "so completely due to the [complainant's] own fault as to break the causal chain." *Petro-Chem Processing*, 866 F.2d at 438 (quoting 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.5, at 458 (2d ed. 1984)) (brackets in original).

The rule of independent causation has been applied to deny standing in a wide variety of circumstances.⁴⁷ The same rationale applies in the present case.

47. See, e.g., *Woods v. Milner*, 955 F.2d 436, 439 (6th Cir. 1992) (doctors who were unqualified for permanent appointments had no standing to challenge their temporary status); *United States v. McNeal*, 900 F.2d 119, 121-22 (7th Cir. 1990) (defendant had no standing to challenge provision of sentencing guidelines when he was ineligible for reduction on other grounds); *Jones v. Cavazos*, 889 F.2d 1043, 1046-47 (11th Cir. 1989) (debtor who had no valid defense to collection action had no standing to complain about denial of due process in IRS collection efforts); *International Union, UAW v. Johnson*, 674 F.2d 1195, 1198-99 (7th Cir. 1982) (plaintiffs had no standing to challenge limits on payment of benefits for which they could not qualify); *Howard v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1099, 1101-02 (3d Cir. 1981) (plaintiffs who failed written portion of exam had no standing to challenge use of physical agility test), *cert. denied*, 458 U.S. 1122 (1982); *Carroll v. Board of Educ.*, 561 F.2d 1, 4 (6th Cir. 1977) (state had no standing to challenge constitutionality of statutes restricting federal funds to be spent on busing for desegregation where no federal

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This case, like others involving after-acquired evidence, is a classic example of an injury with an independent and sufficient cause—Petitioner's misconduct—that breaks the chain of causation between the Banner's alleged discrimination and Petitioner's claimed injury. Petitioner has not disputed that she would have been discharged by the Banner immediately upon learning of her misconduct and that her discharge for that reason would have been entirely lawful. In other words, she would have been fired anyway, without regard to the Banner's alleged discrimination. Thus, the alleged discrimination is not the but-for cause of her discharge, giving her no standing to maintain her discrimination lawsuit.⁴⁸

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funds could be spent for type of busing involved), *cert. denied*, 435 U.S. 904 (1978); *Clark v. Rose*, 531 F.2d 56, 57-58 (2d Cir. 1976) (unsuccessful candidate lacked standing to challenge nominating procedure where he did not meet other criteria for nomination). *See also Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115 (7th Cir. 1983) (majority of panel agreed that plaintiff's inability to obtain funding that was unrelated to constitutional deficiencies in funding program would preclude standing to challenge the alleged deficiencies).

48. The AFL-CIO objects that in determining causation, "the question is not what would have happened but what did happen." (AFL Br. at 9 n.7 (quoting Beale, *The Proximate Causes of an Act*, 33 Harv. L. Rev. 632, 638 (1920))). It observes that in the actual order of events Petitioner was not fired for her then-unrevealed misconduct but for allegedly discriminatory reasons. The misconduct, it argues, like the tort victim's terminal illness, is relevant to valuing the claim but not to determining causation. *Id.* at 7-9. This, of course, would make "what would have happened" relevant to the redressability element of standing in any event, but even as to causation the argument is flawed because it proceeds from a false premise. Determining causation-in-fact always requires an assessment of "what would have happened." The AFL-CIO selectively quotes Prosser's observation that causation "is a measure of what in fact happened," *Id.* at 9 n.7, but ignores a critical qualification: "On the other hand, an act or an omission is not regarded as a cause of an event if the particular event would have occurred without it." W. Prosser, *Handbook of the Law of Torts* 238 (4th ed. 1971) (emphasis added). The real issue is how to define the hypothetical alternative state of affairs implied in the concept of "would have occurred." That issue is discussed in part III(A)(3) *infra* on redressability.

3. Efficacy of a Remedy Directed Solely at the Complained-of Conduct

Closely related to the causation element of the test is the requirement that the plaintiff demonstrate "a likelihood that the injury will be redressed by a favorable decision, by which we mean that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" *Northeastern Fla. Contractors*, 113 S. Ct. at 2302 (quoting *Allen*, 468 U.S. at 752).⁴⁹

Because the presence of a legitimate, independent cause also precludes an effective remedy, the rule of independent causation is often applied under this prong of the standing test as well. *See, e.g., Renne v. Geary*, 111 S. Ct. 2331, 2337-38 (1991) (standing doubtful where a second, unchallenged statute likely would have produced the same result). The critical difference, for present purposes, is that redressability looks to the future rather than the past. Redressability is therefore less a metaphysical question of actual causation than a more practical problem of whether the Court can or should give a plaintiff any effective relief.

The lesson of *Renne v. Geary* is that a valid, independent, after-the-fact justification for challenged conduct can defeat standing on grounds of redressability as well as causation. *Renne*

49. The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement. . . . To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested."

Allen, 468 U.S. at 753 n.19.

recognizes that the justification need not have been one that the defendant knew or relied on in taking the challenged conduct. It is enough if the justification is currently applicable and bars future relief.

As with causation, the only real issue here is when Petitioner's discharge for misconduct will be deemed to have taken place: when the misconduct was committed, when it was discovered, or when it would have been discovered absent the alleged discrimination. If her discharge for misconduct is deemed to have occurred at the time of the misconduct, the rule of independent causation precludes a finding that the alleged discrimination caused her loss of employment.⁵⁰ As with causation, however, when this implied in-law discharge occurred is not a question of historical fact but of imputation based on policy considerations.

The real issue is whether the Court is willing to give Petitioner and other plaintiffs in after-acquired evidence cases the benefit of having successfully concealed their misconduct. If as a matter of policy the Court is not, then on this record the only conclusion must be that Petitioner would have been discharged immediately after the misconduct occurred. Because the misconduct preceded the date of her actual discharge, this lawful implied discharge trumps the actual event and becomes the only legally significant discharge.⁵¹

50. Conversely, if her discharge for misconduct is not deemed to be effective until after October 31, 1990, then her allegedly discriminatory discharge on that date would be the cause of her loss of employment in the interim, until the discharge for misconduct is held to be effective. Of course, to prove that her discharge was in fact discriminatory she would have to establish that the Banner's reasons were pretextual. See *St. Mary's Honor Ctr.*, 113 S. Ct. at 2752.

51. Petitioner may argue that the policies embodied in the ADEA are at least as fundamental as those served by a policy of punishing employee (Cont'd)

B. Plaintiff's Failure to Establish a Prima Facie Case Bars Relief.

As a natural outgrowth of the standing doctrine, plaintiffs must establish a prima facie case in discrimination lawsuits based on disparate treatment. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court held that part of a prima facie case of discrimination is proof that the employee or applicant was qualified for the position. *Id.* If a discrimination plaintiff cannot show that she met the criteria for the position, no recovery is possible. See *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 823 (D.C. Cir. 1984) (FBI special agent applicant and Title VII plaintiff who could not obtain security clearance was not qualified for the job).

In a claim for discriminatory termination, a plaintiff must demonstrate that she was performing her job up to the standard of the employer's legitimate expectations. A plaintiff may have failed to meet an employer's expectations in a number of ways, including simple incompetence. See *Richmond v. Board of Regents*, 957 F.2d 595 (8th Cir. 1992) (age discrimination plaintiff whose performance was unsatisfactory over 18-month period of progressive discipline did not make out a prima facie case); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993) (gender discrimination plaintiff who continually failed to perform accurate

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misconduct. There are two answers to this argument. First, no matter how important the goals of the ADEA, they cannot override the constitutional requirements of standing. Second, it may well be that the Banner would be equally disabled from suing Petitioner to recover wages paid during the period between the dates of the time she would have been discharged and that of her actual discharge. If the parties were indeed *in pari delicto*, this result accords with the traditional rule of equity for maintaining the status quo and declining to intervene on behalf of either. See, e.g., *Securities & Exch. Comm'n v. National Sec., Inc.*, 393 U.S. 453, 464 (1969); *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Tx. R.R. Co.*, 363 U.S. 528, 532 (1960).

inventory counts, one of her primary responsibilities, did not meet her burden); *Villa v. City of Chicago*, 924 F.2d 629 (7th Cir. 1991) (national origin discrimination plaintiff was not meeting his employer's legitimate expectations because he lacked the tactfulness required in the job); *Chambers v. Wynne Sch. Dist.*, 909 F.2d 1214 (8th Cir. 1990) (teacher who applied for counselor position but lacked certification required by state law did not make out prima facie case).

Of course, employee dishonesty or other misconduct is an even stronger ground than incompetence for defeating a plaintiff's claim that she was qualified for the position. See *Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981). The plaintiff in *Williams* had obtained employment at the Library of Congress, in a position that required a law degree, by misrepresenting himself as a law student. *Id.* His deception continued during his employment when he claimed to have graduated from law school and even took a leave of absence from work on two separate occasions to, he said, study for and take a bar examination. *Id.* at 113. When Williams' deception was discovered, he was discharged. *Id.* He subsequently brought suit, alleging race discrimination under Title VII. *Id.*

The D.C. Circuit explained how *McDonnell Douglas* applied to Williams' situation:

When the facts found by the district court and *McDonnell Douglas* are juxtaposed, it is plain that no Title VII offense has occurred here. Mr. Williams or any other Library employee . . . could simply never be entitled to, nor expect to retain, his or her job after establishing such a formidable record of lying to his employer. Trustworthiness, reliability, veracity, good judgment—these are all material

qualifications for any job, including one as a Copyright Examiner. . . .

[Q]ualification of the complainant is the pivotal component of the *McDonnell Douglas* prima facie case. It is clear that from the outset Williams was *not qualified* for the job which he held. . . .

A second defect in Mr. Williams' prima facie case can be characterized as *disqualification*. The lying itself, also from the outset, made him an unfit employee of the Library of Congress, wholly apart from the question of his not being a lawyer or his serving well in appointed tasks. . . . Under all the admitted circumstances, we think it virtually impossible for the Librarian to have acted other than to discharge Williams.

Id. at 117-18.

The court's further comments indicate that Williams' conduct waived his employment status: "Williams was not a *victim* at all. He was the responsible agent in his own termination, 'generat[ing] his own fate' by choosing an unlawful route to employment opportunity." *Id.* at 119 (brackets in original).⁵²

The applicability of the court's analysis of the plaintiff's lack of qualification in *Williams* to the present case is obvious. Even if discovered after Petitioner's discharge, Petitioner was not qualified for the job she held. Her misconduct "disqualified" her at the time

52. The parallel between this explanation and the rule of independent causation requires no explanation. See *Petro-Chem Processing*, 855 F.2d at 438.

she betrayed her trust. She was, objectively, an unfit employee. *See Williams*, 663 F.2d at 117-18 ("[t]rustworthiness, reliability, veracity, good judgment . . . are all material qualifications for any job . . .").⁵³

Although expressing denial of relief in terms of qualifications, the court in *Summers* read *McDonnell Douglas* to presuppose dismissal grounds known to the employer at the time of discharge. *Summers*, 864 F.2d at 705. Regardless of this presupposition in *Summers*, several cases have adopted the doctrine announced in *Summers* by relying on the *McDonnell Douglas* test. *See Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir. 1990) (plaintiff who lied on application not qualified even though his employer did not know about lies at time of adverse employment decision).

The plaintiff in *Gilty* argued that, because his employer did not know about his lies, the information should not affect his discrimination claim. *Id.* at 1251. Rejecting this argument as "specious," the court held:

[T]he determination of whether a plaintiff is "qualified" requires an objective analysis. As

53. A number of other cases construing the qualification prong of *McDonnell Douglas* have reached similar conclusions. *See, e.g., Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 626 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984) (ADEA plaintiff not qualified to work as airline pilot because, in prior job, he falsified address to receive moving expenses and used company card to buy plane tickets for his children in violation of company policy); *Avant v. South Cent. Bell Tel. Co.*, 716 F.2d 1083 (5th Cir. 1983) (falsification of application in failure to reveal prior larceny conviction shows Title VII plaintiff was not qualified); *Robinson v. United States Air Force*, 635 F. Supp. 108, 111-12 (D.D.C. 1986) (Title VII plaintiff's falsification of educational degree on application, known at time of discharge, justified termination, and after-acquired evidence of falsification of employment experience showed plaintiff not qualified because "nature and extent of the false information . . . raise serious questions concerning his good judgment, truthfulness and reliability and basic qualifications. . .").

such, an employer's knowledge or lack of knowledge is of no relevance at the prima facie stage of the case. . . . Under an objective standard, Gilty simply cannot meet the quasi-standing elements set out in McDonnell Douglas. He does not argue, nor does case law support, the notion that "qualified" law enforcement officers need not be "truthful" law enforcement officers. . . . [T]he point is not that Gilty needed, but did not have, a bachelor's degree or a master's degree. The point is that he lied.

Id. (citations omitted and emphasis added).⁵⁴

Application of the logic of the foregoing to the present case compels the conclusion that Petitioner failed to make out a prima facie case based on her disqualification to be a confidential secretary. Put simply, Petitioner came to court seeking relief under the ADEA when, in fact, she never passed and could never pass the threshold prima-facie requirement that she was qualified to be a confidential secretary.⁵⁵ Moreover, because the prima-facie

54. *Dotson v. United States Postal Serv.*, 977 F.2d 976, 978 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992). ("Even though plaintiff's failure to complete the application truthfully was discovered post-termination, he is not entitled to handicap discrimination relief when he was not initially qualified for the position."); *Guzman v. United Airlines*, 53 Fair Empl. Prac. Cas. (BNA) 1419 (D. Mass. 1990) (national origin discrimination plaintiff failed to disclose prior back injury in application and, therefore, failed to show he was qualified for employment).

55. The EEOC concedes that an employee's qualification is essential for any remedy: "[a] properly tailored backpay remedy is then *almost always* appropriate relief for the discriminatory discharge of *an employee qualified for the position she held.*" (EEOC Br. at 21 (emphasis added)).

showing by Petitioner, or any discrimination plaintiff, is the minimum requisite to establish her standing, *see Gilty*, 919 F.2d at 1250, Petitioner is constitutionally barred from maintaining her lawsuit. Accordingly, she is barred from the relief she seeks as a matter of constitutional law and of this Court's incorporation of the standing principle in *McDonnell Douglas*.

C. The Doctrine of Unclean Hands Applies to Bar Relief.

The equitable doctrine of "unclean hands" demands that "[one] who seeks equity must do equity." *Manufacturer's Fin. Co. v. McKey*, 294 U.S. 442, 449 (1935). "[C]onsiderations that make for the advancement of right and justice" properly prevent an unclean litigant from unjustly profiting from misconduct. *See Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933). The unclean hands doctrine "closes the door" to a plaintiff tainted by "inequity or bad faith relative to the matter in which" relief is sought. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945), *quoted in ABF Freight Sys. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring). A plaintiff need not have lived a "blameless" life but must be without "fraud or deceit" in the matter being litigated. *Id.* The door is closed to a tainted plaintiff, "however improper may have been the behavior of the defendant." *Id.*

Petitioner was properly denied all relief because she came seeking equitable remedies when the undisputed evidence established that, in fact, her own hands were unclean.⁵⁶ The application of the unclean-hands doctrine is especially justified when the wrongful conduct is a material and serious fraudulent act or grave breach of good faith, such as Petitioner's. *See Deweese v. Reinhard*, 165 U.S. 386, 390 (1897).

56. In the instant case, Petitioner seeks equitable relief for alleged discriminatory conduct in the form of backpay. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1490 (1994) (backpay consistently viewed as an "equitable" remedy).

An "unclean" employee's misconduct sufficient to demand termination warrants a bar of relief under the unclean hands doctrine because the equity that the plaintiff seeks in the litigation is necessarily and immediately related to the employee's misconduct. *Keystone Drilling Co. v. General Excavation Co.*, 290 U.S. 240, 245 (1933).

It is undisputed that the Banner would fire a "confidential" secretary who was not faithfully discreet in that position of trust. Further, as Petitioner admitted, any reasonable employer would view Petitioner's misconduct to be the very antithesis of the conduct justifiably expected from a confidential secretary and would consider the misconduct a dischargeable offense. Thus, Petitioner's misconduct is immediately and necessarily related to the equitable remedies that she seeks for her discharge.

Petitioner begs this Court to allow her to pursue a claim for backpay and damages, conveniently ignoring the fact that she defrauded her employer not just once but twice. First, she betrayed her employer's trust. Second, she reaped undeserved rewards in the form of salary and benefits that she would otherwise not have received but for her stealth.⁵⁷ Because Petitioner enjoyed undeserved continued employment and accepted paychecks during the time that she practiced her deception, she was properly denied any relief.⁵⁸ To allow her to seek any remedy now would,

57. It is undisputed that had she not covered up her theft, she would have been fired in the summer or fall of 1989, when she began the copying and theft. (*See* II P.Dep. at 227, 230-33).

58. Courts have generally recognized the unclean hands doctrine as a sufficient basis to bar relief in discrimination cases. *Anderson v. Savage Lab., Inc.*, 675 F.2d 1221, 1223 (11th Cir. 1982); *Woods v. Ficker*, 768 F. Supp. 793, 802 (N.D. Ala. 1991), *aff'd without op.*, 972 F.2d 1350 (11th Cir. 1992); *Women Employed v. Rinella & Rinella*, 468 F. Supp. 1123, 1129 (N.D. Ill. 1979); *see Hargett v. Delta Automotive, Inc.*, 765 F. Supp. 1487, 1489 (N.D. Ala. 1991).

therefore, not only give Petitioner the windfall of receiving these wages after her betrayal and the windfall of any additional remedy but would also further penalize the Banner for trusting her. Equity will not allow this result.⁵⁹

IV.

THE ARGUMENTS AND AUTHORITIES OF PETITIONER AND HER AMICI ARE INAPPLICABLE TO THE PRESENT CASE.

Although the doctrine has its genesis in established legal and equitable principles, Petitioner and her amici argue that the doctrine somehow shakes the foundations of established law. As the following shows, Petitioner's argument relies on flawed logic, weak arguments, and inapposite authorities. Neither her arguments nor her authorities can withstand scrutiny.

59. However, if the Court decides that the doctrine should not bar all relief, any permissible relief should be limited. Petitioner herself concedes that damages should be limited in a case such as this where the employer meets its burden of proving that it would have discharged Petitioner had it been aware of the misconduct. (P.Br. at 50). Assuming, arguendo, that this Court decides that even wrongdoers should be entitled to some relief, that relief should be limited to injunctive relief and pro rata fees. This limitation does the least violence to the policy arguments that focus on a balancing of the statutory interests of both employees and employers. Thus, where an employer meets the three-part test articulated above, an employee should not be given an additional windfall of backpay or other damages where that employee has wrongfully benefitted from continued employment and compensation. This balance is at least consistent with the congressional mandate in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), which disallows reinstatement and damages, allowing only declaratory, injunctive relief and attorney's fees in mixed-motive cases. If, as a matter of policy, this Court decides that some relief is appropriate despite the employee's wrongdoing then this limited relief, at most, would strike an appropriate balance.

One of Petitioner's amici argues the rejection of the *in pari delicto* or "unclean hands" defense in litigation involving alleged discriminatory conduct by relying on cases construing the securities and antitrust statutes. (NELA Br. at 4). Such an argument improperly compares apples with oranges by ignoring the legislative history of the ADEA and departing from clearly accepted judicial application.⁶⁰

The ADEA grew out of a study by the Secretary of Labor, *The Older American Worker-Age Discrimination in Employment*. See e.g. H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 2213. The resulting report concluded that, contrary to other types of employment restrictions, it would be "futile as public policy, and even contrary to public interest, to conceive of all age restrictions as 'arbitrary' . . ." *U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964* 21 (1965). Accordingly, Congress specifically approved three situations, including discharge for good-cause, where the ADEA would not prohibit an employer from either restricting or discharging an employee despite her age. 29 U.S.C. § 623(f)(1-3). Here, but for Petitioner's deception, just such a "good cause" discharge would have occurred. The unclean hands doctrine as applied to this case preserves the statutory policy of allowing good-cause discharges: such good-cause discharges should not be frustrated by the deception of the employee who invokes that very statute. Such a conclusion is compelled by the legislative history of

60. Even comparisons of Title VII and prior labor acts such as the NLRA and the Fair Labor Standards Act ("FLSA"), although more logically and substantively related than the comparison attempted by Petitioner, "must necessarily be guarded because the differences between those Acts and Title VII may well outnumber the similarities." *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.19 (5th Cir. 1969) ("entirely different proceeding under an Act with an entirely different purpose and before an agency with an entirely different function"). See also note 36 *supra*.

the ADEA⁶¹ and is evident in the consistent judicial application of the doctrine in cases of alleged discriminatory conduct.⁶²

Petitioner argues that the doctrine should be rejected in the context of employment discrimination because other federal statutes have been construed to discount after-discovered misconduct. Petitioner's reliance on the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 38 U.S.C. § 901 *et seq.*, and the Jones Act, 46 U.S.C. § 688, in support of this argument is completely misplaced. These statutes are compensatory in nature, intended to extend benefits similar to those found under state workers' compensation statutes.⁶³ These laws do

61. Petitioner argues from the premise that the ADEA was designed to seek out and punish employers that discriminate based on age. In reality, because the ADEA is premised on a desire to make any victims of such discrimination whole, the statute is an equitable-remedy statute, not a penal provision.

62. Petitioner's Amici argue that only "[a] few courts have allowed" such a defense "without much analysis." (NELA Br. at 4 n.1). This conclusion, is not warranted by the cases cited in support of it. *See Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993) (otherwise valid, unclean hands defense rejected because plaintiff's false claim of college degree irrelevant to wage discrimination claim as neither her predecessor nor her successor had college degrees); *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991) (rejection of defense as the misconduct was perpetrated by government agency rather than plaintiff, who was clearly "innocent" of any wrongdoing); *Hargett*, 765 F. Supp. 1487 (N.D Ala. 1991) (although rejecting unclean hands defense only on the facts of the case, clearly recognizes defense as otherwise "inevitably available" and a "classic principle of equity jurisprudence"); *Woods*, 768 F. Supp. 793 (unclean hands defense "available in all equity cases," and a "serious defense [that] must be examined"), *aff'd without op.*, 972 F.2d 1350 (11th Cir. 1992).

63. *See Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 507-08 (1957); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 604 (1981); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 546-47 (1960).

not focus on the employee's negligence or misconduct.⁶⁴ These laws are in a class designed to compensate employees for on-the-job personal injuries that are palpable and tangible. As such, this class of laws is conceptually different from the class of laws that combats discrimination, including the ADEA. In the compensatory laws, an injured employee must make only a minimum showing that an employer's negligence led to the employee's injury. In contrast, the ADEA and other discrimination laws require that the employee carry a burden of proving both injury and intent to injure on the part of the employer. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2752. Accordingly, neither the federal compensatory statutes nor the cases construing them are persuasive authority in this matter.

Petitioner's reliance on *Still v. Norfolk & W. Ry.*, 368 U.S. 35 (1961), is misplaced because Petitioner ignores significant distinctions between the issues at stake in *Still* and those of the present case. *Still* is limited to the proposition that an injured railroad worker specifically protected by the FELA was an "employee" despite the fact that he had gained employment by fraud. *Id.* at 45.⁶⁵ Further, the decisions following *Still* have

64. This concept is demonstrated in statutory provisions and decisions limiting the availability of fault-based defenses in connection with statutory recovery. *See* 45 U.S.C. § 54 (FELA), 33 U.S.C. § 904(b) (LHWCA), *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938) (assumption of risk not a defense under Jones Act); *Bobb v. Modern Prods., Inc.*, 648 F.2d 1051, 1056 (5th Cir. 1981) ("The law is well-settled that contributory negligence by the plaintiff will not defeat a seaman's claim under the Jones Act, but may be considered as comparative negligence to mitigate the damages. . .").

65. The Court in *Still* distinguished its holding from that in *Minneapolis, St. Paul & S. Ste. Marie R. Co. v. Rock*, 279 U.S. 410 (1929), where the plaintiff was held not to be an employee because he had been previously denied employment for health reasons, had reapplied under a false name, and had another person impersonate him for the physical exam. The Court stated that, *inter alia*, the plaintiff in *Rock* was an "imposter." *Still*, 368 U.S. at 40. Here, Petitioner's breach of confidentiality while posing as a "confidential" secretary makes her just such an "imposter."

involved job application misrepresentation and either railroad or maritime carrier negligence. See *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986 (9th Cir. 1987); *Gypsum Carrier, Inc. v. Handelsman Maritime Carrier*, 307 F.2d 525 (9th Cir. 1962); *Reed v. Iowa Marine & Repair Corp.*, 143 F.R.D. 648 (E.D. La. 1992); *Spinks v. United States Lines Co.*, 223 F. Supp. 371 (S.D.N.Y. 1963).

Petitioner's reliance on the FLSA to support this argument, while better grounded than her use of the compensation statutes, is also misplaced. The legislative history of the ADEA demonstrates that not all of the provisions of FLSA were adopted into the ADEA. In addition, Petitioner's discussion of *Goldberg* to support her argument is misleading. *Goldberg* is not a "definitive" after-acquired evidence case. While certain of the plaintiff's misdeeds in that case were discovered after her termination from employment, *most were already known to management before her discharge*. Because management continued to employ her despite these incidents and because a retaliatory discharge *had been proved*, the court found her misconduct could be used only to lessen her award, not to deny relief altogether. 302 F.2d at 156. In contrast, the present case presents no facts leading to even an inference of retaliation or any other forms of discrimination, and it is undisputed that the Banner never waived its right to discharge Petitioner.

Finally, the obvious inapplicability of *Still* and *Goldberg* to the present case is best underscored by the fact that the after-acquired evidence cases do not rely on either *Still* or *Goldberg*. The lower courts have not considered these cases applicable authorities, and this Court should reject Petitioner's effort to muddy the issue here by relying on them.

V.

SUMMARY JUDGMENT IS AN APPROPRIATE MEANS OF DISPOSING OF AFTER-ACQUIRED EVIDENCE CASES, ESPECIALLY THE PRESENT CASE.

Since 1986, a trilogy of cases⁶⁶ established that summary judgment is often an efficient procedure to avoid unnecessary trials on insufficient claims. W. Schwarzer, A. Hirsch, D. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1991). In general, these cases clarified that the moving party does not have to disprove the non-moving party's case. *Id.* at 451. When summary judgment is properly used, the procedure conserves time and resources of both the courts and the parties. *Id.*

"Only disputes over facts that might affect the outcome of the suit" will preclude summary judgment. *Anderson*, 477 U.S. at 248. Once the moving party shows that the non-moving party lacks proof to establish a requisite element of its case to survive summary judgment, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 586-87 (citation omitted).

All of the elements entitling the Banner to summary judgment are present here. Petitioner had adequate time to conduct full discovery. After serving interrogatories and document requests and receiving timely responses, Petitioner sought and was granted leave to complete additional depositions to rebut the Banner's motion. Both before and after the extension of time, Petitioner deposed four of the Banner's principals.

Notwithstanding ample time to discover controverting facts

66. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

and any pretext on the part of the Banner, Petitioner found none. For example, Petitioner made no showing that the Banner fabricated evidence against her or that it treated her differently from other employees, including the other eight employees who were part of the reduction in force.

The undisputed facts establish unequivocally that Petitioner's misconduct was directly related to her status as a confidential secretary. By stealing confidential, sensitive information and sharing it with unauthorized persons outside the workplace, Petitioner's actions constituted an egregious breach of her duty. It was equally clear and undisputed that Petitioner would have been terminated had the Banner discovered her theft while she was employed as confidential secretary to the Comptroller. All of the Banner's principals testified under oath, both in affidavits and in depositions under cross examination, to this fact. Finally, of course, Petitioner admitted that she would have been fired if she had been caught. Thus, as a matter of law, the undisputed facts established adequate and just cause for her dismissal even though the Banner was unaware of her theft until after she sued.⁶⁷ Where the facts are undisputed, the moving party fully meets its burden, and the non-moving party has not even a scintilla of evidence to rebut the moving party's proof⁶⁸ or to show pretext, summary judgment is proper.

67. In contrast to some cases denying summary judgment, the facts of the present case do not raise any doubt about the nature and materiality of the misconduct or about the Banner's actions in response. Cf. *Kristufek*, 985 F.2d at 370 (resume falsification about education not critical job requirement, and employer failed to prove it would have fired the plaintiff); *Welch*, 23 F.3d 1403 (single affidavit insufficient to meet employer's burden of proving it would have fired the plaintiff); *Mardell*, 1994 WL 396512 (direct evidence of sex and age discrimination, minor or non-material resume misrepresentations, and single affidavit require trial).

68. Petitioner's assertions (P.Br. at 43) that the district court
(Cont'd)

Just recently, the Court clarified the evidentiary formula for proving pretext: "A reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false *and* that discrimination was the real reason." *St. Mary's Honor Ctr.*, 113 S. Ct. at 2752. Petitioner has produced no evidence of pretext. This case presents no evidence that the Banner rummaged through her employment records to discover some error or omission, however trivial or minor. Rather, the undisputed material facts here are that the misconduct admittedly justified discharge, that discharge was objectively reasonable, and that the Banner would have discharged her had the misconduct come to light.⁶⁹ Thus, summary judgment in favor of the Banner was proper. See *Matsushita*, 475 U.S. at 586-87. To put the parties and judicial system to the expense of a trial when the outcome is inevitable would be an exercise in futility.

(Cont'd)

misunderstood the burden of proof in ruling on the Banner's Motion are wrong. The quoted language in the district court's analysis focused on Petitioner's inability to rebut the Banner's proof that she would in fact have been fired. However, prior to reaching that point in the analysis, the district court properly found that the Banner had fully met its burden on this issue.

69. Although only for purposes of summary judgment, the Banner assumed that Petitioner was subject to discriminatory discharge, she has adduced no evidence of discrimination.

CONCLUSION

As the foregoing shows, the doctrine of after-acquired evidence of wrongdoing is fully consistent with the policies underlying the ADEA, as well as other antidiscrimination statutes, and has its genesis in established legal and equitable principles. The material and undisputed facts of the present case compel application of the doctrine to deny Petitioner a trial. Summary judgment for the employer is proper where, as here, all of the elements of the three-part test, including both objective and subjective un rebutted proof by the employer, are met. Accordingly, Petitioner in this case was properly denied any relief.

Respectfully submitted,

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In the Supreme Court of the United States

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QUESTION PRESENTED

Whether an employee who is discharged in violation of the Age Discrimination in Employment Act is barred from obtaining any remedy if, solely as a result of the unlawful discharge and the litigation challenging it, the employer discovers a lawful basis for dismissal.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission as amici curiae	1
Statement	2
Summary of argument	5
Argument:	
I. The ADEA authorizes federal courts to award backpay and other appropriate relief when an em- ployee is discharged because of age	6
II. The denial of all relief for a discriminatory discharge is not appropriate under the ADEA ...	10
III. The appropriate remedies under the ADEA for a discriminatory discharge followed by the dis- covery of evidence that would have led to a lawful discharge include limited backpay, injunctive and declaratory relief, attorneys' fees, and liquidated damages	23
Conclusion	27

TABLE OF AUTHORITIES

Cases:

<i>ABF Freight System, Inc. v. NLRB</i> , 114 S. Ct. 835 (1994)	22
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	10, 11, 17, 19, 21-22, 25
<i>Arizona Governing Committee v. Norris</i> , 463 U.S. 1073 (1983)	12
<i>Benson v. Quanex</i> , 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. (1992))	17
<i>Bonger v. American Water Works</i> , 789 F. Supp. 1102 (D. Colo. 1992)	17, 19
<i>Calloway v. Partners Nat. Health Plans</i> , 986 F.2d 446 (11th Cir. 1993)	16

IV

Cases—Continued:

Page

<i>Churchman v. Pinkerton's Inc.</i> , 756 F. Supp. 515 (D. Kan. 1991)	17
<i>Darby v. Pasadena Police Dep't</i> , 939 F.2d 311 (5th Cir. 1991)	25
<i>DeVoe v. Medi-Dyn, Inc.</i> , 782 F. Supp. 546 (D. Kan. 1992)	17
<i>Director, OWCP v. Greenwich Collieries</i> , No. 93-744 (June 20, 1994)	25
<i>EEOC v. Goodyear Aerospace Corp.</i> , 813 F.2d 1539 (9th Cir. 1987)	23
<i>EEOC v. Harris Cernin, Inc.</i> , 10 F.3d 1286 (7th Cir. 1993)	23
<i>EEOC v. Recruit-U.S.A., Inc.</i> , 939 F.2d 746 (9th Cir. 1991)	16
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976)	10, 11, 12, 20
<i>Johnson v. Honeywell Information Systems, Inc.</i> , 955 F.2d 409 (6th Cir. 1992)	3, 4, 18-19
<i>Kristufek v. Hussmann Foodservice Co.</i> , 985 F.2d 364 (7th Cir. 1993)	7, 9, 16, 25
<i>Landgraf v. USI Film Products</i> , 114 S. Ct. 1483 (1994)	13
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	8, 11, 13, 16
<i>Los Angeles Dep't of Water & Power v. Manhart</i> , 435 U.S. 702 (1978)	12
<i>Louisiana v. United States</i> , 380 U.S. 145 (1965) ...	10
<i>Mathis v. Boeing Military Airplane Co.</i> , 719 F. Supp. 991 (D. Kan. 1989)	17
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993)	4, 7, 15
<i>Mitchell Bros. Film Group v. Cinema Adult Theater</i> , 604 F.2d 852 (5th Cir. 1979)	15-16

V

Cases—Continued:

Page

<i>Mt. Healthy City School District Board of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	14, 15, 21
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983)	25
<i>O'Day v. McDonnell Douglas Helicopter Co.</i> , 784 F. Supp. 1466 (D. Ariz. 1992), appeal pending, No. 92-15625 (9th Cir.)	17, 19
<i>O'Driscoll v. Hercules, Inc.</i> , 745 F. Supp. 656 (D. Utah 1990), 12 F.3d 176 (10th Cir. 1994)	7, 17, 19
<i>Oscar Mayer & Co. v. Evans</i> , 441 U.S. 750 (1979) ..	10-11
<i>Perma Life Mufflers, Inc. v. International Parts Corp.</i> , 392 U.S. 134 (1968)	15
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	9, 15, 21, 23, 24
<i>Punahale v. United Air Lines, Inc.</i> , 756 F. Supp. 656 (D. Utah 1990)	17
<i>Reed v. Amax Coal Co.</i> , 971 F.2d 1295 (7th Cir. 1992)	19
<i>Smallwood v. United Air Lines, Inc.</i> , 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984)	9, 20
<i>Smith v. General Scanning, Inc.</i> , 876 F.2d 1315 (7th Cir. 1989)	16
<i>Summers v. State Farm Mutual Automobile Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988) ..	3, 13, 14, 15, 16, 20
<i>Trans World Airlines, Inc. v. Thurston</i> , 469 U.S. 111 (1985)	8
<i>United States v. N.L. Industries, Inc.</i> , 479 F.2d 354 (8th Cir. 1973)	11
<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,629d)	11
<i>Wallace v. Dunn Construction Co.</i> , 968 F.2d 1174 (11th Cir. 1992)	7, 9, 15, 16, 17, 19, 20, 24, 25
<i>Washington v. Lake County</i> , 969 F.2d 250 (7th Cir. 1992)	7, 18, 19

VI

Constitution, statutes, and rule:	Page
U.S. Const. Amend. I	14
Age Discrimination in Employment Act, 29 U.S.C. 621 <i>et seq.</i>	1
29 U.S.C. 623(a)(1)	2, 5, 7, 22
29 U.S.C. 623(d)	5
29 U.S.C. 626(b)	5, 8, 13, 23
Americans with Disabilities Act, 42 U.S.C. 12101 <i>et seq.</i>	7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	<i>passim</i>
42 U.S.C. 2000e-5(g)(1)	8
42 U.S.C. 2000e-5(g)(2)(A)	8
42 U.S.C. 2000e-5(g)(2)(B) (Supp. 1992)	21
Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075	21
Equal Pay Act, 29 U.S.C. 206(d)	7
Fair Labor Standards Act of 1938, 29 U.S.C. 201, <i>et seq.</i>	
29 U.S.C. 216(b)	8
29 U.S.C. 217	8
National Labor Relations Act, 29 U.S.C. 160(c) ..	7
Miscellaneous:	
118 Cong. Rec. (1972):	
p. 7166	12
p. 7168	12, 22, 25
EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, 8 Fair Empl. Prac. Man. 405:6915 (July 7, 1992) ..	25, 26
Robert J. Gregory, <i>The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?</i> 9 The Labor Lawyer 43 (1993)	16

VII

Miscellaneous — Continued:	Page
H.R. 1746, 92d Cong., 1st Sess. (1971)	12
H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967) ..	10
H.R. Rep. No. 40(1), 102d Cong., 1st Sess. 1991 (1991 U.S.C.C.A.N. 586)	21
B. Schlei & P. Grossman, <i>Employment Discrimination Law</i> (2d ed. Five-Year Cum. Supp.)	12
S. Rep. No. 723, 90th Cong., 1st Sess. (1967)	10
W. Waldo & R. Mahar, <i>Lost Cause and Found Defense: Using Evidence Discovered after an Employee's Discharge to Bar Discrimination Claims</i> , 9 Labor Lawyer 31 (1993)	18
R. White & R. Brussack, <i>The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation</i> , 35 B.C. L. Rev. 49 (1993)	20, 26
Zemelman, <i>The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility</i> , 46 Stan. L. Rev. 175 (1993)	18

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AS AMICI CURIAE**

**INTEREST OF THE UNITED STATES AND
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE**

This case concerns the proper interpretation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* The decision in this case is also likely to affect litigation under analogous provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Attorney General and the Equal Employment Opportunity Commission share substantial responsibilities for enforcement of these equal employment opportunity laws. The Court's decision in this case will affect those responsibilities.

STATEMENT

1. Petitioner Christine McKennon began working for the Nashville Banner Publishing Company (Banner) in 1951. She was discharged by that company on October 31, 1990, after more than 39 years of service. She was 62 years old at that time. Pet. App. 10a-11a. During her tenure at the Banner, petitioner held several secretarial positions. "[O]ver the years the company consistently evaluated her work performance as excellent." *Id.* at 2a. At the time she was terminated, petitioner was secretary to the Banner's comptroller. The company claimed that it fired petitioner because it needed to reduce the size of its work force. *Id.* at 10a-11a.

In May, 1991, petitioner commenced this suit, alleging that her discharge was in violation of the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer (29 U.S.C. 623(a)(1)):

to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Petitioner alleged that she and one other secretary—the two oldest secretaries at the Banner—were terminated while five younger secretaries with less seniority were retained. Compl. ¶ 14. Petitioner sought a variety of legal and equitable remedies, including backpay, liquidated damages and attorneys' fees. Compl. ¶ 8.

2. During a deposition made in the course of this litigation, petitioner testified that, during her last year of employment at the Banner, she had copied several confidential documents to which she had access in her capacity as the comptroller's secretary. Pet. App. 11a. She did this because she feared that her employer was preparing to discharge her because of her age. Pet. App. 8a, 12a. She

took copies of the documents home with her in order to discuss them with her husband. She testified that she did so "for her 'insurance' and 'protection,' 'in an attempt to learn information' regarding my job security concerns." *Id.* at 12a; see Compl. ¶ 9.

On December 21, 1991, two days after these disclosures at her deposition, and fourteen months after her discharge, the publisher of the Banner sent petitioner a letter "terminating" her employment. Pet. App. 12a. In this letter, and also in an affidavit filed in connection with a motion for summary judgment thereafter filed by respondent, the publisher stated that petitioner's removal and disclosure of these confidential documents was a breach of her job responsibilities and that "the Banner would have discharged Mrs. McKennon when she took and copied the records if it had then known that she had done so." *Id.* at 2a-3a. Other officers of the Banner filed similar affidavits. *Id.* at 3a n.3.

3. The district court granted respondent's motion for summary judgment. Pet. App. 10a-18a. In doing so, the court relied on the "after-acquired evidence" defense articulated by the Sixth and the Tenth Circuits in some cases arising under the ADEA and under Title VII of the Civil Rights Act of 1964. Pet. App. 13a, citing *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and *Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d 409 (6th Cir. 1992).

The district court concluded that it was undisputed in the record that petitioner's actions in copying and disclosing respondent's confidential documents violated her "duty of confidentiality" and "established just cause for firing Mrs. McKennon" (Pet. App. 16a). The court accepted the affidavit of respondent's publisher that he "would have terminated her immediately had he learned of her misconduct at any time prior to her discharge from the

Banner on October 31, 1990" (*ibid.*). For these reasons the court held that petitioner was not entitled to "any relief or remedy" under the ADEA. *Id.* at 14a, quoting *Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d at 415. The court concluded that the "after-acquired evidence" "serves as a complete defense to a wrongful discharge action" under the ADEA. Pet. App. 16a.

4. The court of appeals affirmed (Pet. App. 1a-9a). It agreed that this case is governed by the circuit's "after-acquired evidence" doctrine. The court noted that it had first adopted this doctrine in a case arising under state law (*Johnson v. Honeywell Information Systems, Inc.*, *supra*) and had subsequently applied the doctrine as a complete defense in a case involving a claim of sex discrimination under Title VII (*Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993)). The court stated that, "in *Johnson* and *Milligan-Jensen*, we have firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence" (Pet. App. 6a). The court concluded that the uncontroverted facts established that "Mrs. McKennon was guilty of conduct which, if known by the Banner, would have caused her discharge" (*id.* at 3a). The court held that this evidence constituted a complete defense to petitioner's cause of action under the ADEA for the employer's unlawful discharge of her on account of her age. *Id.* at 3a-9a. The court of appeals rejected petitioner's argument that the doctrine should not be applied when the asserted misconduct occurred as part of the employee's effort to protect herself against a discriminatory termination. The court held that issue to be "irrelevant" because "[t]he sole issue in after-acquired evidence cases is whether the employer would have fired the

*** employee on the basis of the misconduct had it known of the misconduct" (*id.* at 9a).¹

SUMMARY OF ARGUMENT

In view of the disposition of this case below on motion for summary judgment, it must be assumed that respondent unlawfully fired petitioner because of her age. This discharge violated the Age Discrimination in Employment Act, which makes it "unlawful for an employer *** to discharge any individual *** because of such individual's age" (29 U.S.C. 623(a)(1)).

When an unlawful discriminatory discharge in violation of the ADEA has occurred, the statute authorizes the court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA], including without limitation judgments compelling employment, reinstatement or promotion" or backpay. 29 U.S.C. 626(b). The court of appeals' conclusion, that all relief must be withheld if there is evidence establishing that the employee would have been discharged for a reason unknown to the employer at the time the unlawful discharge

¹ The court of appeals noted that 29 U.S.C. 623(d) makes it unlawful for an employer to discriminate against an employee who "has opposed any practice made unlawful by this section" (*ibid.*), but stated that "[c]opying and removing confidential documents is clearly not protected conduct" under this statute. Pet. App. 8a n.7.

The petition does not appear to contend that the provisions of 29 U.S.C. 623(d) justify petitioner's conduct on the facts of this case. Instead, we understand the petition to address the legal question whether after-acquired evidence that would have constituted a lawful "basis for dismissal" bars an employee "from obtaining any remedy" under the ADEA for a discharge that was in fact unlawful. See Pet. i. Accordingly, we do not address in this brief the question whether a discharge motivated solely by petitioner's copying of these confidential documents represented unlawful retaliation under 29 U.S.C. 623(d).

occurred, is inconsistent with the language and purpose of this important remedial provision.

In order to grant appropriate relief for a discriminatory discharge a court should, insofar as possible, design a remedy that will reinforce the strong federal policy of discouraging employment discrimination. A court should also endeavor to insure that an employee who has been the victim of discrimination is not left in a substantially worse position as a result of that discrimination. For these reasons, "after-acquired evidence" of employee misconduct should, in no event, constitute a complete bar to relief for unlawful discrimination. Where an employer can satisfy the substantial burden of showing that it would actually have discharged the employee on the basis of the after-acquired evidence had it not committed its prior discriminatory discharge, it may, however, be appropriate not to order reinstatement and to limit the backpay award so that backpay is not awarded for any period after the lawful discharge would have occurred.

This case should therefore be remanded for the district court to determine whether petitioner's discharge was in fact unlawful and, if so, what legal and equitable relief is appropriate. In addition to backpay and possible reinstatement, liquidated damages, declaratory relief, injunctive relief and attorney's fees are all appropriate remedies under the ADEA even in the presence of after-acquired evidence of employee misconduct.

ARGUMENT

I. THE ADEA AUTHORIZES FEDERAL COURTS TO AWARD BACKPAY AND OTHER APPROPRIATE RELIEF WHEN AN EMPLOYEE IS DISCHARGED BECAUSE OF AGE

In view of the court of appeals' affirmance of the district court's grant of summary judgment for respondent

in this case, it must be assumed that respondent fired petitioner because of her age.² Pet. App. 3a. Such a discriminatory discharge plainly violated the Age Discrimination in Employment Act, which makes it "unlawful for an employer * * * to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)).

The court of appeals nonetheless held that the employer was absolved of liability under the ADEA for the discriminatory discharge because, more than one year after that discharge occurred, the employer learned of employee misconduct that had nothing to do with the discharge. In reaching that conclusion, the court relied (Pet. App. 6a) on its conclusion in *Milligan-Jensen v. Michigan Technological Univ.* that such "after-acquired evidence" makes it "irrelevant whether or not [the employee] was discriminated against" (975 F.2d at 305). In the court's view (Pet. App. 6a), such "after-acquired evidence" constitutes a complete defense to liability for a discriminatory discharge under the ADEA and also under the non-discrimination requirements of Title VII of the Civil Rights Act of 1964.³

² The court of appeals noted that there is "substantial deposition testimony of Mrs. McKennon that she was indeed discharged because of age" (Pet. App. 3a n.2). While respondent disputed this claim (*ibid.*), respondent also acknowledged that the claim of discrimination must be assumed to be true for purposes of respondent's motion for summary judgment. *Id.* at 3a.

³ Variants of the after-acquired evidence doctrine invoked by the courts of appeals have been applied to age, race, religion and gender discrimination claims under the ADEA and Title VII. See Pet. App. 6a; *O'Driscoll v. Hercules Inc.*, 12 F.3d 176, 177 (10th Cir. 1994); *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 365 (7th Cir. 1993); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993); *Washington v. Lake County*, 969 F.2d 250, 251 (7th Cir. 1992); *Wallace v. Dunn Construction Co.*, 968 F.2d 1174, 1176 (11th Cir. 1992). The doctrine is also potentially applicable to other federal laws that prohibit discrimination against employees (e.g., National Labor Relations Act, 29 U.S.C. 160(c); Americans with Disabilities Act, 42 U.S.C. 12101; Equal Pay Act, 29 U.S.C. 206(d)).

The decision of the court of appeals departs from both the language and the policy of the ADEA and Title VII. With respect to remedies, the ADEA incorporates by reference the remedial provisions of the Fair Labor Standards Act (FLSA). 29 U.S.C. 626(b). When an unlawful discharge has occurred, the ADEA thus authorizes reinstatement, backpay, injunctive and declaratory relief and attorneys' fees. *Ibid.*; 29 U.S.C. 216(b), 217. See also *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The ADEA also authorizes an additional award of liquidated damages, in an amount equal to the backpay award, "in cases of willful violations" of that Act. 29 U.S.C. 626(b). The ADEA further specifies that courts have jurisdiction to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion" (*ibid.*).

The substantive prohibition of age discrimination in the ADEA is modelled upon the substantive provisions of Title VII of the Civil Rights Act of 1964, which prohibit discrimination in employment based on race, color, sex, national origin, or religion. 42 U.S.C. 2000e *et seq.* *Lorillard v. Pons*, 434 U.S. at 584; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Under Title VII, as under the ADEA and the FLSA, unlawful discrimination in employment is to be remedied by reinstatement, backpay, injunctive, declaratory and other relief. As under the ADEA, Title VII authorizes federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). Title VII contains only one limitation on such relief: "[n]o order of the court shall require * * * reinstatement, * * * or * * * backpay" if the em-

ployee was "discharged for any reason other than discrimination." 42 U.S.C. 2000e-5(g)(2)(A).

When an employee is discharged because of discrimination based on age, race, sex, color, national origin, or religion, the discharge is unlawful and appropriate relief must be fashioned. Although reinstatement and backpay are not to be ordered if the employee was discharged for a reason other than discrimination, after-acquired information—information that was not known to the employer at the time of its unlawful discrimination—obviously cannot establish that a person was discharged for such a reason. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) ("An employer may not * * * prevail * * * by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision.*") (plurality opinion) (emphasis added); see also *id.* at 260-261 (White, J., concurring); *id.*, at 261 (O'Connor, J., concurring); *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 369 (7th Cir. 1993) (the unlawful character of a "discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge" and "is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not"); *Wallace v. Dunn Construction Co.*, 968 F.2d 1174, 1178 (11th Cir. 1992). Cf. *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 624 (4th Cir.) (evidence of applicant's misconduct that would have been discovered during hiring process if the applicant had not been unlawfully rejected was relevant only to determination of proper remedy under ADEA), cert. denied, 469 U.S. 832 (1984). "After-acquired evidence" thus does not negate the fact that the employer in this case violated the ADEA by discharging petitioner because of her age, nor does it remove the statutory responsibility of the district court to award "appro-

priate" relief to plaintiff—including backpay and reinstatement, if appropriate—for the employer's unlawful behavior.

Although the ADEA and Title VII authorize federal courts to exercise discretion in determining relief under those statutes, that discretion must be exercised in a manner that results in "the most complete achievement" of remedial objectives "that is attainable under the facts and circumstances of the specific case." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1976). Federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 770; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Louisiana v. United States*, 380 U.S. 145, 154 (1965). This is not to say that courts are precluded, despite the discovery of after-acquired evidence, from imposing any limits upon the nature and scope of relief for a discharge based on an unlawful employment practice. The issue that this case presents is what relief remains appropriate under the ADEA and Title VII when, after an employee is unlawfully discharged, evidence of employee misconduct is subsequently discovered.

II. THE DENIAL OF ALL RELIEF FOR A DISCRIMINATORY DISCHARGE IS NOT APPROPRIATE UNDER THE ADEA

1. The ADEA was enacted to eliminate the practice of discrimination against older workers in employment. See, e.g., H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); S. Rep. No. 723, 90th Cong., 1st Sess. (1967). In enacting the ADEA, Congress relied significantly on the prohibitions of Title VII, enacted three years earlier. "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co. v.*

Evans, 441 U.S. 750, 756 (1979). See also *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The fashioning of appropriate remedies for violation of these statutes "invokes the sound equitable discretion of the district courts" (*Franks v. Bowman Transportation Co.*, 424 U.S. at 770). Application of that discretion in a particular case involves, not the court's "inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles." *Ibid.*, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. at 416, quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,629d) (Marshall, C.J.). In particular, the remedy selected must "be measured against the purposes which inform" the statute. *Albemarle Paper Co. v. Moody*, 422 U.S. at 417.

A "primary objective" of Title VII and the ADEA is a "prophylactic one." *Albemarle Paper Co. v. Moody*, 422 U.S. at 417. The remedial measures were included in the statutes to serve as a "spur or catalyst" to cause "employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. *Id.* at 417-418, quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). The statutes are also designed "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co. v. Moody*, 422 U.S. at 418. An award of backpay to an employee who has been fired because of discrimination is presumptively an appropriate remedy, for it "has an obvious connection" with these two statutory purposes. *Id.* at 417, 418. The Court has therefore held (*id.* at 421):

[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the

economy and making persons whole for injuries suffered through past discrimination.⁴

This conclusion flows, not only from the text and object of Title VII and the ADEA, but also from their legislative histories, which provide "emphatic confirmation" (*Franks v. Bowman Transportation Co.*, 424 U.S. at 764) that Congress intended courts to "exercis[e] their equitable powers to fashion the most complete relief possible" for employment discrimination (Section-by-Section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conf. Rep., 118 Cong. Rec. 7166, 7168 (1972)).

⁴ In *Albemarle Paper Co. v. Moody*, the Court noted that the discretion to deny relief for a Title VII violation is limited and that a district court must "carefully articulate its reasons" for declining to award backpay in a particular case. 422 U.S. at 421 n.14. Following *Albemarle*, and prior to the recent development of the "after-acquired evidence" defense, district courts rarely exercised their discretion to deny relief under Title VII. See B. Schlei and P. Grossman, *Employment Discrimination Law* at 526-527 (2d ed., Five-Year Cum. Supp.).

In *Los Angeles Dep't of Water & Power v. Manhart*, which involved application to pension plans of Title VII's prohibition of sex discrimination, the Court held that retroactive relief in the form of refunds to female contributors to the plan was not required. 435 U.S. 702, 721-723 (1978). The Court based that determination on three factors—that the conclusion that differential pension contributions based on sex violated Title VII was in significant doubt before the litigation began, that there was no indication that these plans would be modified following *Manhart* only under the threat of backpay awards, and that ordering retroactive monetary relief could have a "devastating" effect on the solvency of pension plans. *Ibid.* Similarly, in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), the Court denied retroactive monetary relief under circumstances, similar to those in *Manhart*, in which Title VII had not previously been applied to the challenged pension practice and where retroactive application could have serious financial effects on the plans and on the expectations of individuals who had contributed to them over the years. See *id.* at 1105-1106 (Powell, J., dissenting in part and concurring in part).

The circumstances in *Norris* and *Manhart* are the only instances in which this Court has excused an employer who violated Title VII from

The remedies provided by the ADEA reflect, even more clearly than those available under Title VII, the statute's prophylactic objectives. Backpay is a mandatory remedy under the ADEA. *Lorillard v. Pons*, 434 U.S. at 584 n.13. Moreover, unlike Title VII, which did not make punitive damages available until that statute was amended in 1991 (*Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1490-1492 (1994)), the ADEA has, from its first enactment, authorized an award of "liquidated" damages—in an additional amount equal to the backpay award—for "willful violations" of that Act. 29 U.S.C. 626(b).

2. In the present case, the court of appeals concluded that, even when the discharge of an employee is an act of unlawful age discrimination, judgment must nevertheless be entered for the employer (and *all* relief for the unlawful discharge denied) whenever the employer subsequently learns of misconduct that would have led to the discharge of the employee, had the employer known of the misconduct. This holding incorrectly prevents the federal judiciary from exercising its statutory responsibility to award backpay and other appropriate relief in cases in which unlawful discrimination has occurred.

The "after-acquired evidence" doctrine was first formulated by the Tenth Circuit in *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (1988). The *Summers* court allowed an employer charged with a discriminatory firing to defend on the basis of information which, if known by the employer at the time of discharge, would have justified discharge and would have in fact led to discharge.⁵ *Id.* at 708. The court acknowledged that

the responsibility of restoring economic losses that an act of proven discrimination caused its victim. The circumstances that justified the unusual denial of relief in *Norris* and *Manhart* are not present here.

⁵ *Summers* was a field claim representative for State Farm Insurance Company. He sued his employer, claiming that he had been

"such after-acquired evidence cannot be said to have been a 'cause' " of the employee's discharge. *Ibid.* The court nevertheless granted summary judgment for the employer, on the ground that "after-acquired evidence" "preclude[s] the grant of any present relief or remedy" because the employee has not been injured by the discrimination.⁶

discharged unlawfully on the basis of his age and religion. 864 F.2d at 701-702. Summers had a history of falsifying claim forms, for which he had received repeated warnings and a period of probation. *Ibid.* The stated reason for his termination was his generally unsatisfactory job performance. *Id.* at 708. During trial preparation, State Farm discovered more than 150 previously unknown false claim records, including 18 occurrences after Summers had returned to work from probationary status. *Id.* at 703. This "after-acquired evidence" of employee misconduct was relied on by the district court in granting summary judgment for State Farm. *Id.* at 703, 708.

⁶ The court erred in *Summers* in relying (864 F.2d at 704-705) on *Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274 (1977), for the proposition that the employer should prevail whenever "after-acquired evidence" establishes that the employer would have reached the same decision for valid, lawful reasons. In *Mt. Healthy*, the Board of Education fired the plaintiff from his job as a teacher for a series of incidents of which the Board disapproved, including arguments with other teachers (one culminating in his being slapped by another teacher), an argument with cafeteria workers, and arguments and obscene gestures directed at students. The Board also disapproved of plaintiff's calling a radio program and discussing a Board-required dress code. Plaintiff contended that his call to the radio show was protected by the First Amendment, and could not legally be the basis of a decision to fire him. This Court vacated a lower court decision reinstating plaintiff with backpay, holding that if the other incidents, independent of the radio incident, supported the decision to fire him, he was not entitled to relief (*id.* at 287). Unlike the situation in *Summers* and the present case, this Court's focus in *Mt. Healthy* was on the reasons that motivated the Board *at the time it made its decision not to rehire the plaintiff*, not on a hypothetical decision that could or would have been made. See *ibid.* See also *Wallace v.*

Ibid. See also *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d at 304-305 ("if the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damages by being fired * * * [and] it becomes irrelevant whether or not she was discriminated against").

Although courts applying the after-acquired evidence doctrine often purport to assume liability and to address only the availability of relief (see *Summers*, 864 F.2d at 708), in practice those courts that treat the doctrine as a complete defense entirely negate liability by denying the possibility of any relief.⁷ Under the doctrine, the employer's

Dunn Constr. Co., 968 F.2d at 1179 ("*Mt. Healthy* and related principles actually subvert, rather than support, the [*Summers*] rule.").

This Court subsequently emphasized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that an employer must show that legitimate reasons *actually* motivated it *at the time* it made the employment decision under review in order to escape a finding of unlawful discrimination. "[P]roving 'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.' An employer may not * * * prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision.*" *Id.* at 252 (emphasis added and citations omitted).

⁷ An alternative rationale for the "after-acquired evidence" defense incorrectly seeks to apply the equitable doctrine of clean hands to charges of unlawful employment discrimination. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the Court permitted an antitrust action to proceed despite the fact that plaintiffs had participated in the illegal practice, noting that "[w]e have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." *Id.* at 138. Other courts have similarly noted that "equitable doctrines should not have been applied where their application will defeat the purpose of a statute." *Mitchell Bros. Film Group v. Cinema Adult*

discrimination is thus said to be "irrelevant" (Pet. App. 6a) because the victim is said to be "entitled to no relief" (*Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d at 708). Even assuming that after-acquired evidence would in some cases have provided a reason for a discharge had no discrimination taken place, treating such evidence as a complete defense to the award of relief for employment discrimination that actually occurred ignores and obstructs the strong public policy goals of the ADEA and Title VII.⁸ Allowing "after-acquired evidence" completely

Theater, 604 F.2d 852, 862 (5th Cir. 1979). See also *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450-452 (11th Cir. 1993) (refusing to apply the "clean hands" doctrine to bar relief in fair employment litigation); *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753-755 (9th Cir. 1991) (same). Application of the clean hands doctrine to bar all relief for discrimination where an employer discovers evidence of employee misconduct would substantially frustrate the deterrent and remedial objectives of Title VII. See *Wallace v. Dunn Construction Co.*, 968 F.2d at 1181 n.10; Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?* 9 *The Labor Lawyer* 43, 64-66 (1993). Moreover, under the ADEA backpay is a required, legal remedy (*Lorillard v. Pons*, 434 U.S. at 523) which an "equitable" doctrine of "clean hands" cannot negate.

⁸ The Seventh Circuit has explained the analytical flaw in treating "after-acquired evidence" as a defense to liability for unlawful discrimination. See *Kristufek v. Hussmann Foodservice*, 985 F.2d 364, 369 (1993) ("A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. * * * The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not."); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (1989) (district court's narrow focus on after-acquired evidence that employee falsely claimed on his resume to have requisite college degree "distracted from the real issue in this case[,] the lawfulness of Smith's termination"; after-discovered resume fraud was "irrelevant" to the central question "[w]hether GSI discriminated against Smith").

to absolve an employer from liability under Title VII or the ADEA directly conflicts with the statutory goal of requiring employers "to self-examine and to self-evaluate their employment practices" and to identify and end discriminatory practices (*Albemarle Paper Co. v. Moody*, 422 U.S. at 418). As the Eleventh Circuit stated in *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (1992), employers can be expected to regard the after-acquired evidence defense as an invitation (*id.* at 1180):

to establish ludicrously low thresholds for "legitimate" termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and then manufacturing a "legitimate" reason for the discharge that fits the flaws in the employee's background.

Assertion of the after-acquired evidence defense on a motion for summary judgment—before an adjudication of the claimed discrimination can take place—also enables an employer wholly to avoid public exposure of its discriminatory practices.⁹ In addition to removing an im-

⁹ The recent proliferation of district court decisions adjudicating summary judgment motions predicated on the after-acquired evidence defense suggests how wide-ranging this application of the doctrine can become. See, e.g., *Bonger v. American Water Works*, 789 F. Supp. 1102, 1107 (D. Colo. 1992); *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal pending, No. 92-15625 (9th Cir.); *DeVoe v. Medi-Dyn, Inc.*, 782 F. Supp. 546 (D. Kan. 1992); *Benson v. Quanex*, 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992); *Churchman v. Pinkerton's Inc.*, 756 F. Supp. 515 (D. Kan. 1991); *Punahale v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991); *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656 (D. Utah 1990), aff'd, 12 F.3d 176 (10th Cir. 1994); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991 (D. Kan. 1989); see also

portant incentive to obey the law, the defense as thus applied frustrates the statutory objective of focussing public awareness on unlawful employment practices. *Id.* at 1180-1181.¹⁰

Seizing upon this opportunity to evade exposure, adjudication, and responsibility for illegally discriminatory practices, employers now routinely embark upon extensive, post-discharge investigations designed to uncover some theoretically valid post hoc justification for terminating an employee who has brought a claim of unlawful discrimination, instead of conducting the self-examination and correction of unlawful practices that Title VII and the ADEA are designed to require. See W. Waldo & R. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered after an Employee's Discharge to Bar Discrimination Claims*, 9 Labor Lawyer 31, 32 n.1, 41 (1993) (suggesting that the search by employers for after-acquired evidence is now the "[m]ost important" first step upon learning of a discrimination complaint). The large number of recent cases in which employers have offered "after-acquired evidence" in order to attempt to avoid liability for allegedly discriminatory actions indicates the destructive impact the doctrine can have on antidiscrimination goals.¹¹

Washington v. Lake County, 969 F.2d at 254 n.3 (citing unpublished cases).

¹⁰ See Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 Stan. L. Rev. 175, 202 (1993) (by ignoring the fact that the discharge was unlawful, the courts that apply the after-acquired evidence defense "fail to expose and punish discrimination when it actually motivated the employer").

¹¹ The potential for abuse of the after-acquired evidence defense, particularly at the summary judgment stage, has been acknowledged even by those circuits that have recognized the defense. See *Johnson*

Reliance on after-acquired evidence to deny relief to victims of unlawful employment discrimination also frustrates the goal of the federal nondiscrimination statutes to make "persons whole for injuries suffered on account of unlawful employment discrimination" (*Albemarle Paper Co. v. Moody*, 422 U.S. at 417-418). If all relief for a discriminatory discharge is precluded by after-acquired evidence, many employees will be left in a substantially worse position than if discrimination had never occurred. As the Eleventh Circuit pointed out in *Wallace v. Dunn Construction Co.*, reliance on after-acquired evidence to deprive an employee of all relief ignores the fact that the employee "would have remained employed for at least some period of time after he was actually discharged" (968 F.2d at 1179-1180). The after-acquired evidence defense conflicts with the make-whole objective of Title VII and the ADEA because it "ignores the lapse of time between the [discriminatory] employment decision and the discovery of a legitimate motive for that decision." *Id.* at 1179.

v. Honeywell Information Systems, Inc., 955 F.2d 409, 414 (6th Cir. 1992) (noting the need "to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge"); *Reed v. Amax Coal Co.*, 971 F.2d 1295, 1298 (7th Cir. 1992) (noting need "to prevent employers from avoiding Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal but would not, in fact, result in discharge").

Despite such admonitions, district courts have granted summary judgment based upon "after-acquired evidence" supported by no more than the self-serving affidavit of a company official or supervisor stating that the employer would have fired the employee had it been aware of the hypothetical basis for dismissal. See, e.g., *Washington v. Lake County*, 969 F.2d at 256-257; *Bonger v. American Water Works*, 789 F. Supp. at 1107; *O'Day v. McDonnell-Douglas*, 784 F. Supp. at 1469; *O'Driscoll v. Hercules*, 745 F. Supp. at 659.

3. In determining the appropriate relief for an unlawful discharge, federal courts are to seek "the most complete achievement of the objectives of Title VII" (*Franks v. Bowman Transportation Co.*, 424 U.S. at 770-771) or the ADEA. When an employee is discriminatorily (and therefore unlawfully) discharged, the fact that valid reasons for a termination are thereafter discovered may in some cases be a proper basis for limiting the backpay period. It may also in some circumstances be a reason for rejecting reinstatement as a remedy. Such "after-acquired evidence" does not, however, ordinarily justify the complete and automatic denial of backpay and reinstatement.¹² Denying all backpay almost inevitably places the employee who has suffered discrimination in a worse economic position because of the discriminatory discharge and, at the same time, allows

¹² See, e.g., R. White & R. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C.L. Rev. 49, 55 (1993). This case does not present the situation, discussed in *Wallace v. Dunn Construction Co.*, in which an employer prematurely ends a hiring process for a discriminatory reason but demonstrates that, had the hiring process continued, the employer would have discovered evidence that would have led it to refuse to hire the individual for nondiscriminatory reasons. See 968 F.2d at 1178 n.8. In that situation, the court noted that, although Title VII was violated, backpay or reinstatement would not be granted because the applicant would not in fact have been hired had the hiring process continued properly (*ibid.*). In that factual situation, an employer may thus be able to establish that no loss of employment or wages actually resulted from the discrimination. See, e.g., *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (4th Cir.), cert. denied, 469 U.S. 832 (1984). Declaratory and injunctive relief against the discriminatory practice may, of course, still be available in appropriate cases of that type. The present case also does not involve the situation, discussed in *Summers*, where an employee obtains a position by misrepresenting an essential job qualification. 864 F.2d at 708 (hypothesizing a false representation on job application that the applicant is a doctor).

the employer to profit from its illegal conduct.¹³ A properly tailored backpay remedy is thus almost always appropriate relief for the discriminatory discharge of an employee qualified for the position she held.¹⁴ See *Albemarle*

¹³ Cf. *Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274, 285-286 (1977) (an employee should be "placed in no worse a position than if he had not engaged in the [constitutionally protected] conduct").

¹⁴ A recent amendment to Title VII in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075, codifies the principle that evidence of a lawful basis for an employer's discriminatory conduct is relevant only to the determination of appropriate relief for unlawful discrimination, not to the existence of liability. Section 107 of the 1991 Act reverses decisions holding that an employer who acts with a mixture of discriminatory and nondiscriminatory motives "may avoid a finding of liability" under Title VII (*Price Waterhouse v. Hopkins*, 490 U.S. at 258 (plurality opinion)). Under Section 107, when both proper and improper motivations exist for an employment decision, and each separately supports the decision, the court *must* find a violation of Title VII. 42 U.S.C. 2000e-5(g)(2)(B) (Supp. IV 1992). In that situation (where the nondiscriminatory motive was actually a reason for the employment decision), the court may order declaratory or injunctive relief to prevent future similar violations, and attorneys' fees, but may not order "admission, reinstatement, hiring, promotion, or [backpay]" (*ibid.*).

To establish liability under the amended statute, a plaintiff "must demonstrate the discrimination was a 'contributing' factor in the employment decision." 1991 U.S.C.C.A.N. 586 (House Report No. 102-40(1)). Congress enacted the amendment to "clarify that proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not the liability for discriminatory employment practices, but only the appropriate remedy." *Ibid.*

In cases arising after the effective date of the 1991 amendments, the "after-acquired evidence" defense will, if not invalidated, place an employer who was motivated solely by discriminatory factors, but who later learns of a lawful basis for its action, in a far better position than one who harbored both lawful and unlawful motives at the time

Paper Co. v. Moody, 422 U.S. at 421, quoting 118 Cong. Rec. 7168 (1972) (“[P]ersons aggrieved by the consequences and effects of the unlawful employment practice [should] be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.”) Similarly, the statutory remedies of declaratory relief, injunctive relief prohibiting future discrimination, liquidated damages (for “willful violations”) and attorneys’ fees would also remain appropriate remedies for a discriminatory discharge (29 U.S.C. 623(a)(1)).¹⁵

of the adverse employment decision. While the wholly discriminatory employer would be able to avoid a determination of liability and any relief by asserting a defense premised on “after-acquired evidence,” the employer with mixed motives will be held liable for its discriminatory conduct and may be subject to declaratory or injunctive relief, fees, and costs.

¹⁵ This Court has recently addressed the issue of post-employment misconduct in a related context. In *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835 (1994), the National Labor Relations Board (NLRB) ordered an employee reinstated to his job, with backpay, after the Board found that his termination was affected by anti-union bias. This order was entered even though the employee was found to have lied both to his employer and to the Board. The Court upheld the order of reinstatement and backpay and rejected the employer’s claim that the employee’s perjury should automatically disqualify him from both. *Id.* at 840. The Court noted that Congress had vested the Board with discretion to shape relief that “best effectuate[s] the policies of the Act” (*id.* at 839). The Court concluded that it could not “fault the Board’s conclusions that [the employee’s dishonesty] was ultimately irrelevant to whether antiunion animus actually motivated his discharge and that ordering effective relief in a case of this character promotes a vital public interest.” *Id.* at 840.

III. THE APPROPRIATE REMEDIES UNDER THE ADEA FOR A DISCRIMINATORY DISCHARGE FOLLOWED BY THE DISCOVERY OF EVIDENCE THAT WOULD HAVE LED TO A LAWFUL DISCHARGE INCLUDE LIMITED BACKPAY, INJUNCTIVE AND DECLARATORY RELIEF, ATTORNEYS’ FEES, AND LIQUIDATED DAMAGES

1. When a discharge of a qualified employee is followed by the discovery of after-acquired evidence of employee misconduct that would have led to a lawful discharge, a limited remedy for the unlawful discharge is appropriate. Consistent with the analysis prescribed in *Price Waterhouse v. Hopkins*, 490 U.S. at 252, the district court in this case should first have determined whether respondent acted unlawfully in discharging respondent because of her age. If such unlawful discrimination occurred, declaratory relief and attorneys’ fees should always be awarded under 29 U.S.C. 626(b). The court may also grant injunctive relief to enjoin further discriminatory practices unless the employer demonstrates that the discrimination is unlikely to recur. See *EEOC v. Harris Cernin, Inc.*, 10 F.3d 1286, 1292 (7th Cir. 1993); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987). If, however, the district court then finds, on the basis of convincing evidence offered by the employer and subject to cross-examination and rebuttal, that the employer, had it not previously discriminated against the employee by discharging her, would have fired her for the misconduct it discovered, the court would then act within its discretion in denying reinstatement or front pay. When an employer thus clearly demonstrates that it would have discharged the employee wholly apart from its discriminatory animus against her, a requirement of reinstatement or front pay “would go beyond making [the employee] whole and would unduly trammel [the employer’s] freedom to law-

fully discharge employees." *Wallace v. Dunn Construction Co.*, 968 F.2d at 1182. See also *Price Waterhouse v. Hopkins*, 490 U.S. at 239.

The burden placed upon the employer in such cases to show that it would have acted lawfully despite its prior discrimination should be a substantial one. The employer must show, in the manner of an affirmative defense, that it *would* have terminated the employee, not merely that grounds existed upon which it lawfully *could* have done so. In the ordinary employment situation, employees may commonly engage in misconduct, such as lateness, on-the-job errors, or other lapses, that may theoretically be a justification for discharge but that have ordinarily been responded to by the employer with lesser sanctions, or none at all. After-acquired evidence of such "misconduct" cannot constitute the required demonstration that the employer would have terminated the employee absent discriminatory animus. In order to make such a demonstration an employer should ordinarily be required to show that other employees, who had not been the objects of discrimination, had been terminated for similar reasons. Nor should an employer be able to escape liability for backpay by relying upon evidence of misconduct that the employer did not discover in the ordinary course of business, but that was unearthed during a search of the employee's record or background that was inspired by, and designed as a response to, the employee's discrimination allegations. Finally, the evidence that a lawful discharge would have occurred must be evaluated in light of the proof that a discriminatory discharge did, in fact, take place, and that evidence must be sufficiently clear and convincing to overcome the inference of bias created by that proof.¹⁶

¹⁶ Placing the burden with the employer in the manner of an affirmative defense is appropriate in light of the fact that any uncertainty as to whether the employee would have been fired in the absence of discrimination is uncertainty brought about by the employer's dis-

Where an employer succeeds in meeting its burden of demonstrating that a lawful discharge would have occurred had the prior discriminatory termination not taken place, a limited backpay remedy nonetheless remains appropriate. Awarding backpay to the time when the employee would lawfully have been discharged restores her "to a position where [she] would have been were it not for the unlawful discrimination" (*Albemarle Paper Co. v. Moody*, 422 U.S. at 421, quoting 118 Cong. Rec. 7168 (1972)).¹⁷ Terminating backpay on the date that after-acquired evidence would have resulted in such a discharge strikes an appropriate balance between the right of the employee to be free from discrimination under Title VII and the right of the employer to discharge an employee for valid, legitimate reasons. See *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993).¹⁸ The Equal Employment Oppor-

crimatory actions. As the Court noted in an analogous situation under the National Labor Relations Act, "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1993). See also *Director, OWCP v. Greenwich Colerries*, No. 93-744 (June 20, 1994), slip op. 11 (reaffirming that the employer bears the burden of persuasion as to affirmative defenses under the National Labor Relations Act).

¹⁷ The Eleventh Circuit has suggested, in this context, that the employee's "backpay period should not terminate prematurely unless [the employer] proves that it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation." *Wallace v. Dunn Construction Co.*, 968 F.2d at 1182.

¹⁸ Awarding an unlawfully discharged employee backpay to the date on which the employer would have terminated the employee had no discrimination occurred does not nullify any state-law remedy the

tunity Commission (EEOC) has also determined that limited backpay, injunctive and declaratory relief, attorneys' fees, and compensatory damages, if applicable, should be awarded in these circumstances. See EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, 8 Fair Empl. Prac. Man. 405:6915, 6927 (July 7, 1992). See also R. White & R. Brussack, *supra*, at 80-86.

2. In determining whether after-acquired evidence would, in fact, have resulted in a discharge absent any prior discrimination, courts should hesitate to accept unsubstantiated, self-serving and conclusory employer affidavits. See note 11, *supra*. Only in the clearest cases should this remedial issue be addressed in a summary judgment context. The courts below concluded in the present case that the self-serving affidavits of respondent's officers were sufficient to establish, as a matter of undisputed fact, that the discharge of petitioner based on after-acquired evidence was not pretextual. The correctness of those decisions is questionable. This case must, in all events, be remanded for further proceedings at which the remedial issue will be open for reconsideration on a fuller record.

If, on remand, the court finds that petitioner's initial discharge in October, 1990, was discriminatory but that she thereafter would have been lawfully discharged based on after-acquired evidence, the court would then have discretion to deny reinstatement and terminate backpay as of the date the discharge would have occurred absent discrimination. In this situation, declaratory relief, an injunction against future discriminatory practices, liquidated damages

employer may have if it was injured by an employee's false representations or other improper conduct. While state laws that conflict with Title VII are preempted, those that do not impede the prohibitions of the statute are unaffected. See, e.g., *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 314 (5th Cir. 1991).

(if the initial discharge represented willful discrimination) and attorneys' fees would also constitute appropriate remedies under the ADEA for the employer's unlawful discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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CLERK OF THE COURT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

On Writ Of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	AFTER ACQUIRED INFORMATION SHOULD BE TREATED IN THE SAME MANNER UNDER THE ADEA AS UNDER OTHER FEDERAL LAWS REGULATING EMPLOYER- EMPLOYEE RELATIONS	4
III.	RESPONDENT'S PROPOSED PER SE RULE IS INCONSISTENT WITH DECISIONS OF THIS COURT	6
	A. Scope of Coverage of the ADEA	6
	B. Prima Facie Case	8
	C. Standing	10
	D. The Clean Hands Doctrine	11
IV.	ANY INJURY SUSTAINED BY RESPONDENT SHOULD BE REDRESSED UNDER STATE LAW.	13
V.	WHETHER RESPONDENT WOULD HAVE DISMISSED PETITIONER FOR THE ASSERTED MISCONDUCT CANNOT BE RESOLVED BY SUMMARY JUDGMENT	17
	CONCLUSION	20

TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Pages:</i>
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	5, 12, 15
Allen v. Wright, 468 U.S. 737 (1984)	11
Brennan v. Reynolds & Co., 367 F. Supp. 440 (N.D. Ill. 1973)	20
Burnett v. Grattan, 468 U.S. 42 (1984)	16
Calloway v. Partners National Health Plans, 986 F.2d 446 (11th Cir. 1993)	12, 13
Deweese v. Reinhard, 165 U.S. 386 (1897)	11
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	5, 9
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	6, 9
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	10
Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962)	4
Harris v. Forklift Systems, Inc., 126 L. Ed. 2d 295 (1993)	5
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	9

Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968)	20
John Cuneo Inc, 298 N.L.R.B. 856 (1990)	3
Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409 (6th Cir. 1992)	1
Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933)	11
Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951)	4
Lorillard v. Pons, 434 U.S. 575 (1978)	11
Lujan v. Defenders of Wildlife, 119 L. Ed. 2d 351 (1992)	10
Mandarin, 228 N.L.R.B. 930 (1977)	3
Mardell v. Harleysville Life Insurance Co., 1994 WL 396512 (3d Cir. 1994)	3, 13, 17
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)	7, 8, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	7, 8, 9
McKennon v. The Nashville Banner Publishing Co., No. 92-5917 (6th Cir.)	8
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)	5

Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), <i>vacated</i> , 114 S. Ct. 22 (1993)	8
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	6
Northeastern Florida Gen. Contractors v. Jacksonville, 124 L. Ed. 2d 586 (1993)	10
O'Daniel Oldsmobile, 179 N.L.R.B. 398 (1969)	3
Omar v. Sea-Land Service, Inc., 813 F.2d 989 (9th Cir. 1987)	13
Owens Illinois Inc., 290 N.L.R.B. 1193, <i>enf. without opinion</i> , 872 F.2d 413 (3d Cir. 1989)	3
Regents of University of Cal. v. Bakke, 438 U.S. 265 (1978)	11
St. Mary's Honor Center v. Hicks, 125 L. Ed. 2d 407 (1993)	16
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984)	8
Swan v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971)	17
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	9, 19
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	9

United States v. SCRAP, 412 U.S. 669 (1973)	10
Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992), <i>rehearing en banc granted</i> , ___ F.3d ___ (11th Cir. 1994) ...	1
<i>Statutes:</i>	<i>Pages:</i>
28 U.S.C. §1367	14
29 U.S.C. §160(c)	6
29 U.S.C. §623(a)(1)	7
29 U.S.C. §623(f)(3)	5
29 U.S.C. §626(b)	11
29 U.S.C. §626(c)(1)	11
29 U.S.C. §630(f)	7
29 U.S.C. §631(a)	7
<i>Miscellaneous:</i>	<i>Pages:</i>
H.L. McClintock, Handbook of Equity (1936)	12
J. Pomeroy, A Treatise on Equity Jurisprudence (1941)	12
M. Rubinstein, The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation, 24 Suffolk U. L. Rev. 1 (1990)	13

I. INTRODUCTION

Respondent urges this Court to adopt a per se rule¹ that would "bar all relief" (R.Br. 22-42) and require dismissal of all ADEA claims whenever its proposed after-acquired information doctrine applies. As now enunciated by respondent, that per se rule would mandate dismissal of any employment discrimination complaint if a court concludes that three distinct requirements have been met:

- (a) the plaintiff engaged in "serious wrongdoing related to employment";

¹ As we noted in our opening brief (P.Br. 2-4), the complaint in this action expressly sought several distinct types of relief. The proceedings in the district court were controlled by Sixth Circuit precedent, which required -- where the after-acquired information doctrine applied -- that a complaint be dismissed completely and that all relief be denied. (Pet. App. 13a-17a) (District Court decision citing Sixth Circuit precedent). The Sixth Circuit decision in *Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d 409 (6th Cir. 1992), was issued on January 30, 1992, six weeks before petitioner's district court brief, and four months before the district court decision. (J. App. 2a, 3a). By the time this case came before the court of appeals, there were four Sixth Circuit cases imposing this per se rule. (Pet. App. 5a, 6a, 6a n.6). Respondent now insists that petitioner was obligated to set out in her briefs in the lower courts how each remedy sought in her complaint would be affected if those courts utilized, instead of that per se rule, the remedy-specific approach in *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992), rehearing *en banc* granted, ___ F.3d ___ (11th Cir. 1994). (R. Br. 3, 3 n.7, 11). But such arguments would have been pointless, since the Sixth Circuit had already rejected the *Wallace* approach. Operating within the constraints of Sixth Circuit precedent, petitioner defended, and respondent attacked, the complaint in its entirety. Neither party can fairly be said, on that account, to have waived its right to advance arguments regarding the particular remedies sought in the complaint if this Court, as we urge, adopts a remedy-specific rather than a per se rule. Respondent itself advances in this Court just such arguments (R.Br. 42 n.59), although it did not do so in the courts below.

- (b) discharge for that misconduct would be "objectively reasonable";
- (c) the employer would in fact have terminated the plaintiff for the misconduct had that employer been cognizant of it.

(R.Br.17-18)².

Respondent offers no standard for distinguishing "serious" misconduct, which would be fatal to any ADEA claim (if the other requirements are met), from non-serious misconduct which, presumably, would have no impact whatever on such a claim. In reply to our objection to the lack of any specific standard, respondent retorts that the distinction is so obvious that a request for a standard "defies reason and experience and is insulting to the federal judiciary." (R.Br.17 n.26). Respondent also proffers no explanation of how to determine when a dismissal would be "objectively reasonable", other than to suggest that this is not a question that should be left to a jury. (R.Br.19 n.30). These amorphous formulations provide no meaningful guidance for assessing employee actions in the infinite variety of employment disputes that arise at plants and offices with widely divergent standards, practices, and corporate cultures³.

² Respondent appears to suggest yet a fourth requirement, that there be no "direct evidence" of discrimination. (R.Br.13-14 n. 22; see also *id.* at 49).

³ Few employers would dismiss a worker who made a single personal telephone call from a company phone; most employers would probably fire a worker who covertly made \$10,000 in personal long distance calls at the firm's expense. But courts have no authority or capacity to establish a federal common law rule as to how many personal telephone calls on an office phone constitute "serious" wrongdoing.

In our view the threshold question is a narrower and simpler one -- would the employer in fact have dismissed the plaintiff had it known of the asserted misconduct? The seriousness of the asserted misconduct, and the reasonableness of the dismissal are, we suggest, merely evidence the finder of fact may consider in determining what the employer would have done had it learned of the misconduct.⁴ Satisfaction of this single requirement,⁵ however, entitles an employer, not to dismissal of all claims, but only to certain limitations on the available relief.⁶ The analysis which we advance is similar to that of the Third Circuit in *Mardell v. Harleysville Life Insurance Co.*, 1994 WL 396512 (3d Cir. 1994).

⁴ The ADEA does not establish its own code of employee conduct or level of sanctions. Federal anti-discrimination law permits an employer to dismiss workers for trivial offenses, and to take actions a judge or jury may regard as unreasonable, so long as the employer's actions are not animated by a discriminatory motive and, in some instances, so long as they do not have a discriminatory effect.

⁵ In enforcing the NLRA, the NLRB imposes a second requirement, that the employer prove the employee engaged in "misconduct so flagrant as to render the employee unfit for further service or a threat to the efficiency of the plant." See *John Cuneo Inc.*, 298 NLRB 856, 857 (1990); *Owens Illinois Inc.*, 290 NLRB 1193, *enf. without opinion*, 872 F.2d 413 (3d Cir. 1989); *Mandarin*, 228 NLRB 930, 931-32 (1977); *O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969). However, because the federal courts which enforce the ADEA and Title VII, unlike the NLRB, lack the experience and expertise in employment matters necessary to evaluate readily such fitness issues, and because the EEOC Guidelines contain no such restriction, we do not advocate imposing this additional requirement on employers in discrimination cases.

⁶ As we note in our opening brief (P.Br. 30-42), an employer which can prove that absent discrimination it would have discovered the misconduct prior to the date of entry of judgment may be able to limit relief, specifically pre-judgment backpay, even further.

After-the-fact discovery of misconduct on the part of an ADEA plaintiff cannot legalize nunc pro tunc unlawful action by an employer. See *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). Unlike purely private contract disputes between employers and employees, civil actions under the ADEA enforce statutory norms of transcendent public importance. Nothing in the language of the ADEA authorizes dismissal of otherwise meritorious discrimination claims as a method of recompensing employers for injuries sustained by reason of employee misconduct; the appropriate remedy for an employer aggrieved by such injuries is an action under applicable state law.

II. AFTER ACQUIRED INFORMATION SHOULD BE TREATED IN THE SAME MANNER UNDER THE ADEA AS UNDER OTHER FEDERAL LAWS REGULATING EMPLOYER-EMPLOYEE RELATIONS

The established interpretations of five other federal laws regarding employer-employee relations have rejected a per se rule denying all relief. (P.Br.13-21). Respondent does not challenge the correctness of these interpretations of those statutes,⁷ but insists that the ADEA should be construed differently.

Respondent suggests that reference to the unquestioned interpretation of other statutes is never

⁷ *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962) does not support respondent's suggestion that the Fifth Circuit awarded back pay because the employer had "waived" its right to dismiss the plaintiff. On the contrary, the Fifth Circuit insisted that some remedy was *always* required for a proven violation of the FLSA. 302 F.2d at 156 ("it is impossible for us to imagine cases when a denial of both reinstatement and reimbursement would be justified (once a court has concluded that an employee was discharged in violation of the Act)"). See also *id* at 155 (employer "was not informed of several of Mrs. Powell's actions until after her discharge.")

appropriate, because the ADEA is simply a distinct statute with its own purpose and legislative history. (R.Br. 43). Respondent objects particularly to reliance on the settled interpretation of the NLRA and the FLSA. (R.Br. 43 n.60). But this Court has expressly relied on the NLRB's interpretation of the NLRA, and on judicial interpretation of the FLSA, in construing Title VII. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976)(NLRA); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (FLSA), 419-20 (NLRA)(1975). There is no reason to ignore this same body of law when construing the ADEA.

Respondent urges that the established interpretation of statutes such as the Federal Employers' Liability Act is irrelevant because those laws provide redress for physical injuries which are "palpable and tangible". (R.Br. 44-45). But the injuries subject to redress under federal anti-discrimination law are equally real and substantial. Plaintiffs who are dismissed in violation of the ADEA or Title VII suffer "tangible, economic" harm, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986); the economic loss of an employee dismissed in violation of the ADEA is indistinguishable from the economic loss of an FELA plaintiff unable to work because of a physical injury. Discriminatory on-the-job harassment also causes "tangible effects"; it may "affect employees' psychological well being ... and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Systems, Inc.*, 126 L.Ed.2d 295, 302 (1993). Injuries caused by invidious discrimination are certainly as important as the injuries redressed by the FELA. Federal anti-discrimination laws address an "historic evil of national proportions." *Albemarle Paper Co. v. Moody*, 422 U.S. at 416.

Respondent seeks to distinguish these established interpretations of other laws by pointing to the section of the ADEA which provides that an employer may "discharge or otherwise discipline an individual for good cause". 29 U.S.C.

§623(f)(3). (R.Br. 43). But the NLRA contains an essentially identical provision:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. §160(c). In both statutes the preposition "for" means "because of"⁸, and refers to the employer's reason for acting at the time of the discharge. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 n.6 (1983).

Respondent urges, finally, that the Court should ignore these established interpretations of other federal statutes because those statutes, unlike the ADEA, "do not focus on the employee's negligence or misconduct." (R.Br.45). But nothing in the language of the ADEA suggests that its purpose is to "focus on the employee's ... misconduct". On the contrary, as experience has already indicated, the central vice of respondent's proposed per se rule is *precisely* that it requires federal court's to "focus on the employee's ... misconduct", rather than to "focus ... [on] whether the employer is treating 'some people less favorably than others'" for unlawful reasons. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

III. RESPONDENT'S PROPOSED PER SE RULE IS INCONSISTENT WITH DECISIONS OF THIS COURT

A. Scope of Coverage of the ADEA

Respondent contends that the complaint in this action should be dismissed because the ADEA does not apply to a person who has committed serious misconduct. (R. Br. 27 n.42). "[A]n employee who knowingly engages in

⁸ See Webster's Seventh New Collegiate Dictionary, 325 (1967).

discharge-worthy misconduct is ... simply not protected ... under the statute". (R. Br.28). The plain language of the ADEA, however, contains no such exception for the "undeserving" (R. Br. 27 n.42), but applies broadly to "any individual." 29 U.S.C. § 623 (a)(1). Where Congress wished to exclude a group of persons from coverage by the inclusive statutory language, it did so expressly, excepting, for example, persons under forty, 29 U.S.C. § 631 (a), and certain elected and policy-making government officials. 29 U.S.C. § 630 (f).

This Court has repeatedly refused to exclude employees or job applicants from the protection of federal law because they may have engaged in misconduct. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), held that Title VII applied to the discrimination claims of a job applicant who had previously been arrested and convicted for deliberately obstructing the road to the plant at issue, despite the "seriousness and harmful potential" of the applicant's conduct. 411 U.S. at 806 n. 21; see also *id.* at 806 ("a seriously disruptive act"). In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court rejected an argument, indistinguishable from that of respondent, that Title VII did not apply to employees who had stolen property from their employer:

Respondents contend that ... Title VII affords petitioners no protection in this case, because their dismissal was based upon the commission of a serious criminal offense against their employer. We think this argument is foreclosed by our decision in *McDonnell Douglas Corp. v. Green* We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based ... on participation in *serious misconduct* or crime directed against the employer. The Act prohibits *all* racial discrimination, without exception for any group of particular employees

427 U.S. at 282-83 (Emphasis added). In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Court rejected a similar argument that the NLRA should be construed not to protect undocumented alien workers who had violated federal criminal laws by entering the United States illegally.⁹

B. Prima Facie Case

Respondent suggests that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), makes proof of qualification a necessary element of any cause of action for discrimination, without which a plaintiff can never establish a prima facie case. (R. Br. 35-40). At this stage of the proceedings, however, the Sixth Circuit properly assumed that petitioner could establish a prima facie case. (Pet.App. 5a, 6a, 6a n.6)¹⁰. The question is whether after-acquired information constitutes a complete defense to a proven violation of the ADEA. See *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992)(complaint dismissed despite district court finding of Title VII violation), *vacated*, 114 S.Ct. 22 (1993).

Proof of qualification is not a necessary element of a prima facie case. The touchstone of a disparate treatment claim, under Title VII or the ADEA, is not whether a plaintiff was qualified, but "whether the employer is treating

⁹ "The breadth of [the statutory language] is striking: The Act squarely applies to 'any employee'. The only limitations are specific exceptions.... Since undocumented aliens are not among the few groups expressly exempted by Congress, they plainly come within the statutory definition of employee." 467 U.S. at 891-92.

¹⁰ Respondent acknowledges that in the proceedings below "for purposes of summary judgment, the Banner assumed petitioner was subject to discriminatory discharge." (R.Br.49 n. 69). See Brief on Behalf of Defendant - Appellee, *McKennon v. The Nashville Banner Publishing Co.*, No. 92-5917 (6th Cir.), 28 ("For the purpose of summary judgment, a discriminatory motive in discharging the plaintiff is assumed....")

'some people less favorably than others'" because of some criterion, such as age, forbidden by federal law. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). In order to establish a prima facie case, a plaintiff need only adduce evidence "from which one can infer, if [the employer's] actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act'". 438 U.S. at 567. In determining the actual motives of an employer, the qualification *vel non* of a plaintiff may well be relevant evidence, since it tends to undermine or support a possible non-discriminatory explanation for the employer's actions. But qualifications or disqualifications of which an employer was unaware are simply irrelevant to a determination of the employer's state of mind; in the instant case petitioner's actions in copying the disputed documents, even if in some sense relevant to her qualifications, were of course unknown to respondent when it dismissed her in October, 1990.

This Court has repeatedly stressed, moreover, that the formula in *McDonnell Douglas* was not "the only means of establishing a prima facie case Our decision in that case ... did not purport to create an inflexible formulation." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); see also *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. at 575-76. This Court has twice expressly held that a plaintiff can establish a prima facie case without evidence of individual qualifications. *Teamsters v. United States*, 431 U.S. at 358-60; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976). Direct evidence of discrimination, such as a smoking gun memorandum directing personnel officials to "fire all black workers," would obviously suffice to establish a prima facie case, regardless of whether the *McDonnell Douglas* formula was satisfied. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

C. Standing

Respondent's standing argument can fairly be described as an "academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688 (1973). Respondent does not deny that what actually occurred in this case is that petitioner was fired on October 31, 1990, for reasons that necessarily had nothing to do with the copied documents; respondent dismisses those events, however, as a mere "historical fact". (R.Br. 34). In applying this Court's standing decisions, respondent insists, actual events should be ignored; the "only real issue" is what circumstances should be "deemed to have occurred ... based on policy considerations." (*Id.*). Respondent urges this Court to pretend that petitioner was fired for misconduct in the fall of 1989, a year before her actual dismissal. In this make-believe scenario, the discriminatory policy alleged to have existed in the fall of 1990 would have had no impact on petitioner, since by then she would not have worked for respondent for a year. This hypothesized scenario, respondent urges, "trumps the actual event[s]". (*Id.*)

Petitioner's standing, however, should be determined in light of what actually occurred in the real city of Nashville, Tennessee, in October 1990, not on the basis of non-existent occurrences in an imaginary world hypothesized to exist "based on policy considerations." The linchpin of standing, this Court has repeatedly held, is "injury in fact". *Northeastern Florida Gen. Contractors v. Jacksonville*, 124 L.Ed. 2d 586, 595 (1993)(emphasis added); *Lujan v. Defenders of Wildlife*, 119 L.Ed. 2d 351, 364 (1992). Standing issues are controlled by the "actual ... not ... hypothetical" events. *Northeastern Florida Gen. Contractors*, 124 L.Ed. at 595; *Lujan*, 119 L.Ed.2d at 365. The existence of standing, where controverted, is determined, not on the basis of policy based speculation, but by "evidence adduced at trial." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.30 (1979). Standing can neither be created nor eliminated by hypothesizing circumstances which did not in fact occur.

Cf. Allen v. Wright, 468 U.S. 737, 751 (1984). "Having injured [petitioner] solely on the basis of an unlawful classification, [respondent] cannot now hypothesize that it might have employed lawful means of achieving that same result." *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 320 n.54 (1978).

D. The Clean Hands Doctrine

The clean hands doctrine cannot support the per se rule advocated by respondent. That doctrine, where applicable, limits only the availability of equitable relief; the ADEA, however, expressly authorizes the award of all appropriate "legal or equitable relief."¹¹ 29 U.S.C. §§ 626 (b), 626 (c)(1) (Emphasis added). Even as to equitable relief, the clean hands doctrine is not a mechanical rule, but turns on the particular circumstances of each case and involves the "free and just exercise of discretion" by the court. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 246 (1933). The discretion of a district judge to deny some relief in some cases cannot justify a per se rule mandating denial of all relief in every case.

After-acquired information which might have prompted an employer to dismiss an employee need not involve employee misconduct sufficiently egregious to warrant application of the clean hands doctrine. *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897) (misconduct must be "offensive to the dictates of natural justice."). The often

¹¹ Although backpay has for other purposes been characterized by this Court as equitable, it is difficult to see how the discretionary maxims of equity could readily be applied in an ADEA case in which the jury awards backpay. The ADEA provides a statutory right to trial by jury without regard to the nature of the relief being sought. *Lorillard v. Pons*, 434 U.S. 575 (1978). *Lorillard* concludes that Congress intended monetary awards under the FLSA to be treated as legal remedies. 434 U.S. at 583 n.11. The ADEA incorporates the FLSA remedial scheme.

mundane workplace rules enforced by employers need not, and frequently do not, involve transgressions of such magnitude; an employer may dismiss a worker for simple inefficiency, or for actions that other employers might tolerate or even approve of. Similarly, the clean hands doctrine can bar relief only where the plaintiff's unconscionable actions have caused the defendant significant harm. J. Pomeroy, *A Treatise on Equity Jurisprudence*, v.ii, p. 99 (1941). Manifestly not every rule violation which might lead to the dismissal of an employee will necessarily involve such injury. The doctrine is also limited to cases in which the plaintiff's actions were part of the same transaction which gave rise to the claim for equitable relief, H.L. McClintock, *Handbook of Equity* 34 (1936), a requirement that clearly is not met where, as here, the employer complains of employee action that occurred a year before the alleged unlawful dismissal. *Calloway v. Partners National Health Plans*, 986 F.2d 446, 450-51 (11th Cir. 1993).

Like any other limitation on relief, moreover, the clean hands doctrine cannot be invoked in a manner "which, if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination ... and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Employee misconduct which might otherwise warrant application of the clean hands doctrine, for example, may not be invoked to limit relief against an employer which discriminates in the sanctions it imposes for such misconduct, see, e.g., *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), or which investigates only, or more thoroughly, employees over forty, or former employees who file ADEA charges.

In its attempt to invoke the clean hands doctrine, respondent resorts to somewhat inflated rhetoric, accusing petitioner of "betrayal" (R.Br. 42), "theft" (R.Br. 1, 15) and

a "cover-up." (R.Br. 41)¹². The instant case, however, does not involve Aldrich Ames, Michael Milken or the Watergate conspirators. Petitioner is an ordinary secretary, employed by a small circulation newspaper, who, anticipating that she might be unlawfully dismissed, copied several company documents that she thought showed that she was being mistreated. Respondent cannot plausibly invoke the clean hands doctrine with regard to employee actions precipitated by an impending violation of federal law.

IV. ANY INJURY SUSTAINED BY RESPONDENT SHOULD BE REDRESSED UNDER STATE LAW.

Respondent argues vociferously that it has been grievously wronged by petitioner's asserted conduct. Respondent's characterization of that conduct goes well beyond the actual record in this case. (See pt. V, *infra*). Be that as it may, if respondent wishes to assert any claim against petitioner, respondent, like any other employer in Tennessee, must base that claim on state law.¹³

¹² This particular allegation is somewhat ironic, since the effect and purpose of the per se rule advanced by respondent are to preclude the federal courts, and EEOC, from investigating or determining whether there had been a violation of federal law. See M. Rubinstein, "The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation," 24 Suffolk U. L. Rev. 1, 28 (1990) ("There is something wrong with a body of law which allows an employer to cover up its illegal activities by searching an employee's past for unknown fabrications.")

¹³ *Mardell v. Harleysville Life Insurance Co.*, 1994 WL 396512, *12 (3d Cir. 1994) ("such evidence may serve as the foundation for a claim of fraud, conversion, or the like by the employer against the employee in the appropriate forum"); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 989, 991 (9th Cir. 1987) ("If Sea-Land wanted to sue Omar for breach of contract, its action could not be under the Jones Act.")

Respondent asserts that petitioner "stole" a dozen sheets of paper on to which she had photocopied certain information. (R.Br. 1). Respondent may conceivably have an action for conversion under Tennessee law. Respondent also argues that all wages which petitioner received from the fall of 1989 until her October 31, 1990, dismissal, were obtained by "deception". (R.Br. 41). If Tennessee law gives to an employer in such a situation a right to sue for return of those wages, respondent may also be able to pursue such a state claim. In some instances these or other state causes of action might offset, substantially or completely, a plaintiff's federal claim. There may be circumstances in which a federal court would have supplemental jurisdiction to consider a counter-claim based on state law. 28 U.S.C. § 1367.

Respondent, however, does not seek to assert any state law claims. Rather, evidently regarding the provisions of Tennessee law as deficient, respondent urges this Court to craft a federal common law of employer rights and remedies. Respondent apparently acknowledges that Tennessee law gives it no right in these circumstances to obtain repayment of wages paid to petitioner. (R.Br. 35 n.51). Respondent does not claim it was injured by any disclosure of confidential information to the public or to its competitors, since no such disclosure occurred. Respondent understandably has little interest in recovering the fair market value of a few pages of photocopying. Similarly, the amicus Chamber of Commerce, evidently broadly dissatisfied with state laws throughout the nation, insists that a per se federal rule regarding "serious misconduct" is necessary to "maintain important workplace standards of conduct."¹⁴ Deeming insufficient state law claims and regulations in this area, the Chamber of Commerce urges this Court to devise a defense to the ADEA which would provide to its 220,000

¹⁴ Motion of the Chamber of Commerce of the United States for Leave to File Brief Amicus Curiae, par. 3, p. i.

members "a powerful incentive to combat employee fraud and misconduct".¹⁵

This Court, however, has no general mandate to fashion judicial rules to police the American workplace. From among the wide variety of issues that arise in the nation's offices, factories and farms, Congress has selected only a limited number for control by federal law, leaving the rest for regulation by the states, or to less formal resolution by employers, unions, and individual workers. The care and specificity with which Congress has selected only certain subjects for federal regulation compels considerable caution when the federal courts are urged to resolve issues which Congress has deliberately chosen not to address.

Fashioning standards of conduct for workers and job applicants would require the sort of legislative line drawing that courts are ill-equipped to engage in. Respondent urges that a per se federal rule should distinguish "serious" employee misconduct from moderate, minor, or technical infractions. The Chamber of Commerce insists the rule should extend to resumé "fraud", but apparently not to mere puffing, exaggeration, or minor mistakes in resumé or job applications. Any sensible standard of employee conduct would undoubtedly distinguish between levels of infractions, but it is difficult to see how a federal court would have the ability, or authority, to establish such a classification system.

Adoption by the federal courts of the proposed per se rule would have little effect on the actions of employees or job applicants. Such a rule would impose sanctions on

¹⁵ *Id.*, par. 5. The ADEA, of course, was enacted, not to police employee misconduct, but to end invidious discrimination by employers. The paramount incentive under the ADEA is that "the reasonably certain prospect" of a monetary award constitutes an "incentive ... which causes employers ... to self-examine and to self-evaluate their employment practices." *Albemarle Paper Co. v. Moody*, 422 U.S. at 417-18.

only those errant workers or job applicants who had meritorious discrimination claims. Less than .005% of Americans workers file employment discrimination lawsuits in federal court in any given year¹⁶; not all of these are found to be meritorious. For 99.995% of American employees -- those who are not discrimination victims, and those victims who choose not to sue -- the per se rule would be largely irrelevant. It would be exceedingly peculiar to interpret the ADEA to impose on discrimination victims burdens which neither federal nor state law places on otherwise indistinguishable non-victims¹⁷.

Even where the proposed per se rule would apply, the redress it would provide to aggrieved employers would be entirely arbitrary. Ordinarily the size of a monetary award is based primarily on the magnitude of the injury sustained by the victim. But under the per se rule, the "remedy" accorded to an employer would consist of cancellation of the employee's discrimination claim, the magnitude of which turns on the amount of injury that had been sustained by the employee. Thus an employer which had suffered a \$10 injury might receive the windfall of cancellation of a \$100,000 liability. Here, as in *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407 (1993), federal anti-discrimination law cannot be converted into a vehicle for solving largely unrelated problems. "The elimination of ... discrimination ... is a large task and one that should not be retarded by efforts to achieve broader purposes lying

¹⁶ Brief Amicus Curiae of the Chamber of Commerce of the United States, p. 9 n. 8.

¹⁷ If Tennessee were to enact such a strangely selective rule, giving employers a right to a refund of wages from errant workers who filed meritorious ADEA suits, but from no other employees, such a state statute would certainly be struck down as inconsistent with the ADEA. See *Burnett v. Grattan*, 468 U.S. 42, 53 n.15 (1984).

beyond the jurisdiction of [the federal courts]". *Swan v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 22 (1971).

V. WHETHER RESPONDENT WOULD HAVE DISMISSED PETITIONER FOR THE ASSERTED MISCONDUCT CANNOT BE RESOLVED BY SUMMARY JUDGMENT

Under both the standard now advanced by respondent and the standard advanced by petitioner, an employer cannot invoke after-acquired information without proving that it would have dismissed the plaintiff on the basis of that information. The district court below did not purport to resolve that question. Respondent now asks this Court to grant partial summary judgment regarding this issue. This Court, however, does not ordinarily undertake to consider fact-bound questions that have not been squarely addressed by the lower courts. This issue is one that should be determined by the district court on remand.

This issue cannot be resolved by summary judgment in this case. The inherently speculative nature of this question places on the party bearing the burden of proof, the employer, a substantial burden. The Chamber of Commerce of the United States urges, correctly in our view, that an employer seeking to prove that it would have dismissed an employee must adduce "evidence of uniform rules applied in an even-handed manner"¹⁸. As the Third Circuit has observed: "At one time or another probably every employee commits an infraction at work and hopes that the boss never finds out." *Mardell v. Harleysville Life Insurance Co.*, 1994 WL 396512, *14 n. 28 (3d Cir. 1994). The Chamber of Commerce asserts that at least "30% of job

¹⁸ Brief Amicus Curiae of the Chamber of Commerce of the United States, p. 16; see also Motion for Leave to File Brief Amicus Curiae of the Chamber of Commerce of the United States, par. 5 (employer must demonstrate the existence of "objective rules and ... uniform administration").

applicants materially misrepresent their credentials."¹⁹ Manifestly, however, no rational employer would dismiss every employee guilty of misconduct. As other business amici note, an employer which fired every worker guilty of some infraction "would soon find itself with no experienced workers, no productivity, no profits, and an abundance of self-inflicted lawsuits."²⁰ Thus the mere fact that a worker committed some infraction, on the job or during the application process, proves little; the critical burden on the employer is to establish by reference to both objective rules and actual practice which types of infractions, if any, necessarily led to dismissal. In the instant case respondent adduced neither type of evidence. Respondent's conclusive affidavits were contradicted or undermined in a number of respects. (P.Br. 5-6).

Respondent attempts to avoid these difficulties by repeatedly asserting that petitioner herself testified that her conduct, if known to respondent, "would have led to discharge"²¹. However, the testimony at issue, set out at pages 153a-155a of the Joint Appendix, reveals that petitioner actually insisted she would *not* have been terminated for taking the documents home, since she did not make them public²².

¹⁹ Motion for Leave to File Brief Amicus Curiae of the Chamber of Commerce of the United States, par. 4.

²⁰ Brief Amici Curiae of the Equal Employment Advisory Council, et al., p. 21.

²¹ R. Br. 14; see also *id.* at 1, 6, 7, 9, 11, 15, 18, 41, 48, 49.

²² "Q -- [Didn't you know that if] Mr. Simpkins, had found out that you had copied these documents and taken them home without permission, these confidential documents, that he would have terminate[d] you?

"A. No, I don't know that.

* * *

Counsel for respondent seeks to offer in this Court additional arguments for dismissal. But see *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 9 (1981). Counsel objects that the documents at issue were shown to petitioner's husband and attorney²³. But the company officials who signed respondent's affidavits and dismissal letter evidently did not believe those actions were grounds for dismissal, since they mentioned neither in the affidavits and letter. (J. App. 35a-43a). Counsel for respondent accuses petitioner of "fraud", "deceit" and a "coverup"²⁴, words redolent with implications of perjury and forgery. Nothing in the record supports any such charge. Respondent does not deny that the documents may contain evidence supporting petitioner's discrimination claim (see P. Br. 4); rather than dismissing the documents as irrelevant, respondent complains it has been "sandbagged" (R. Br. 22 n. 33) because it did not learn until after this suit was filed that petitioner had them. Respondent concedes company officials had previously sought to destroy several of the documents, and had actually directed petitioner to shred them. (R. Br. 7,15).

Respondent urges, finally, that petitioner should be denied relief if this Court finds that "any reasonable employer would have terminated an employee under the circumstances that the present case presents." (R.Br. 19). This argument fundamentally misconceives the role of federal courts in enforcing the ADEA. "The Federal Judge ... does not sit as a sort of high level industrial arbiter",

"Q. And you understood if you took them home, you would have been terminated?

"A. No, I really didn't understand that because they were safe in the house." (J. App. 154a).

²³ R. Br. 6 n. 12, 7, 15.

²⁴ R. Br. 21 n. 34, 26, 27 n. 42, 41, 41 n. 57, 43.

Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968), authorized to dispense mercy to employees of "unreasonably" harsh employers, or to penalize employees of "unreasonably" lax employers. In a disparate treatment case the responsibility of the federal courts is limited to determining whether the employer engaged in intentional discrimination, and to providing to victims of discrimination the remedies authorized by federal law.²⁵

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed, and the case remanded for a trial on the merits.

Respectfully submitted,

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²⁵ See *Brennan v. Reynolds & Co.*, 367 F. Supp. 440, 444 (N.D. Ill. 1973) ("[The ADEA] is concerned about age discrimination. Its purpose is not to solve other problems about employment.... [The Act] does not cast upon the Court the duty of determining that a discharge was, for reasons other than age, a justifiable discharge. Its serves only to prevent discharge because of age alone").

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTINE MCKENNON,
v. *Petitioner,*

THE NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND,
EQUAL RIGHTS ADVOCATES, NATIONAL COUNCIL
OF JEWISH WOMEN, NATIONAL COUNCIL OF NEGRO
WOMEN, NATIONAL ORGANIZATION FOR WOMEN,
NATIONAL WOMEN'S LAW CENTER, NOW LEGAL
DEFENSE AND EDUCATION FUND, OLDER WOMEN'S
LEAGUE, PEOPLE FOR THE AMERICAN WAY, WOMEN
EMPLOYED, WOMEN'S LAW PROJECT, AND
YWCA OF THE U.S.A.
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE AFTER-ACQUIRED EVIDENCE DOCTRINE HAS BEEN APPLIED TO UNDERMINE THE PURPOSES OF ANTIDISCRIMINATION LAW	3
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:

	Page
<i>Agbor v. Mountain Fuel Supply Co.</i> , 810 F. Supp. 1247 (D. Utah 1993)	4
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	5
<i>Bonger v. American Water Works Ass'n</i> , 789 F. Supp. 1102 (D. Colo. 1992)	12, 14
<i>Dotson v. U.S. Postal Serv.</i> , 977 F.2d 976 (6th Cir. 1992), <i>cert. denied</i> , 113 S.Ct. 263 (1992)	3, 4
<i>Johnson v. Honeywell Info. Sys., Inc.</i> , 955 F.2d 409 (6th Cir. 1992)	3, 4
<i>Miller v. Beneficial Management Corp.</i> , No. 89-3089, 1993 U.S. Dist. LEXIS 19168 (D. N.J. Sept. 20, 1993)	15, 16
<i>Miller v. Beneficial Management Corp.</i> , 977 F.2d 834 (3rd Cir. 1992)	14, 15
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 975 F.2d 302 (6th Cir. 1992), <i>cert. granted</i> , 113 S.Ct. 2991, and <i>cert. dismissed</i> , 114 S.Ct. 22 (1993)	8, 10
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 767 F. Supp. 1403 (W.D. Mich. 1991)	9
<i>O'Driscoll v. Hercules, Inc.</i> , 745 F. Supp. 656 (D. Utah 1990)	7
<i>Reed v. AMAX Coal Co.</i> , 971 F.2d 1295 (7th Cir. 1992)	3, 4
<i>Rich v. Westland Printers</i> , No. HAR 92-2475, 1993 U.S. Dist. LEXIS 8526 (D. Md. June 9, 1993)	5, 7
<i>Ross v. Communications Satellite Corp.</i> , 759 F.2d 355 (4th Cir. 1985)	7
<i>Russell v. Microdyne Corp.</i> , 830 F. Supp. 305 (E.D. Va. 1993)	17, 18
<i>Summers v. State Farm Mut. Auto. Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	3, 4
<i>Van Deursen v. U.S. Tobacco Sales & Mktg. Co., Inc.</i> , 839 F. Supp. 760 (D. Colo. 1993)	10, 11
<i>Wallace v. Dunn Constr. Co.</i> , 968 F.2d 1174 (11th Cir. 1992)	3, 5
<i>Washington v. Lake County, Ill.</i> , 969 F.2d 250 (7th Cir. 1992)	3, 4

TABLE OF AUTHORITIES—Continued

Page

<i>Welch v. Liberty Mach. Works</i> , No. 93-2670, 1994 U.S. App. LEXIS 10028 (8th Cir. May 6, 1994) ..	4
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STATUTES AND RULES:

Age Discrimination in Employment Act, 29 U.S.C. § 621	<i>passim</i>
Rehabilitation Act of 1973, § 501 <i>et seq.</i> , 29 U.S.C.A. § 791 <i>et seq.</i>	3
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e	<i>passim</i>

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1543

CHRISTINE MCKENNON,
v. *Petitioner,*

THE NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND,
EQUAL RIGHTS ADVOCATES, NATIONAL COUNCIL
OF JEWISH WOMEN, NATIONAL COUNCIL OF NEGRO
WOMEN, NATIONAL ORGANIZATION FOR WOMEN,
NATIONAL WOMEN'S LAW CENTER, NOW LEGAL
DEFENSE AND EDUCATION FUND, OLDER WOMEN'S
LEAGUE, PEOPLE FOR THE AMERICAN WAY, WOMEN
EMPLOYED, WOMEN'S LAW PROJECT, AND
YWCA OF THE U.S.A.
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*¹

Amici curiae are non-profit public interest advocacy organizations that work to ensure the development of legal principles that will advance the employment rights of women and other disadvantaged classes and result in

¹ Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

the sound administration of federal antidiscrimination laws. They litigate and educate the public to improve equal opportunity for women and other historically disadvantaged groups. Statements of Interest of individual *amici* are attached as an Appendix to this brief.²

SUMMARY OF ARGUMENT

Currently, an employer who has engaged in unlawful discrimination may, in some jurisdictions, obtain judgment as a matter of law without ever having to justify its discriminatory action before a judge or jury. The employer need only show that it would have made the same employment decision had it known of newly-discovered misconduct by the employee—regardless of the fact that this misconduct played no role in the decision.

The use of this “after-acquired evidence doctrine,” as it has become known, has extended to a wide range of antidiscrimination statutes. In doing so, courts have, in essence, allowed employers to escape all liability for even proven discrimination.

The Age Discrimination in Employment Act, along with Title VII of the Civil Rights Act of 1964 and anti-discrimination law in general, has two underlying purposes: making victims of discrimination whole and deterring future discrimination. Application of the after-acquired evidence doctrine to bar relief completely for discrimination victims undermines both of these purposes.

This brief samples a range of cases that show how the after-acquired evidence doctrine has worked to insulate employers from answering serious allegations of discrimination, thus frustrating the purposes of federal anti-discrimination law.

² *Amici* gratefully acknowledge the significant contributions of law clerk Dann Determan in the preparation of this brief.

ARGUMENT

THE AFTER-ACQUIRED EVIDENCE DOCTRINE HAS BEEN APPLIED TO UNDERMINE THE PURPOSES OF ANTIDISCRIMINATION LAW.

The question in this case is whether an employee who is discharged in violation of the ADEA is barred from obtaining any remedy if, solely as a result of the unlawful termination and the litigation challenging it, the employer discovers another basis for its employment decision.

The use of the “after-acquired evidence doctrine,” as it has become known, has extended to other antidiscrimination statutes as well. See *Dotson v. U.S. Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992) (Rehabilitation Act); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992) (Title VII); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) (same). Several courts have applied the doctrine as a complete bar to remedy for a plaintiff alleging discriminatory employment decisions. See *Dotson v. U.S. Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). In doing so, these courts have, in essence, allowed an employer to escape all liability for even proven discrimination. The Eleventh Circuit, in rejecting this doctrine, observed that the after-acquired evidence doctrine allows “an employer [to] avoid all liability for a discharge based solely on unlawful motives by proving that it would have discharged the plaintiff absent any unlawful motives if it had possessed full knowledge of the circumstances existing at the time of the discharge.” *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1178 (11th Cir. 1992).

An employer exploiting the after-acquired evidence doctrine need never justify its discriminatory employment

decision before a judge or jury. The employer need only show that it would have made the same employment decision had it known of the employee's newly-discovered misconduct—regardless of the fact that this misconduct played no role in the decision.³ Indeed, as was the case with Christine McKennon, the employee's misconduct in many instances is not even discovered until preparation for trial on the discrimination claim. See *Dotson v. U.S. Postal Serv.*, 977 F.2d 976, 977 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Washington v. Lake County, Ill.*, 969 F.2d 250, 252 (7th Cir. 1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 411 (6th Cir. 1992); *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 703 (10th Cir. 1988); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247, 1251 (D. Utah 1993).

The Eleventh Circuit recognized the perverse consequences of the application of the after-acquired evidence doctrine:

[The doctrine] encourages an employer with a proclivity for unlawful motives to hire a woman—despite knowledge of a legitimate reason that would normally cause the employer not to employ her—to destroy any evidence of such knowledge, to pay her less on the basis of her gender, to sexually harass her until she protests, to discharge her, and to “discover” the legitimate motive during the ensuing litigation,

³ Moreover, an employer's “proof” that it would have made the same employment decision had it known of the employee's misconduct has often consisted of self-serving affidavits by its own management. See *Dotson v. U.S. Postal Serv.*, 977 F.2d 976, 978 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992); *Washington v. Lake County, Ill.*, 969 F.2d 250, 256 (7th Cir. 1992). But see *Welch v. Liberty Mach. Works*, No. 93-2670, 1994 U.S. App. LEXIS 10028, at *9 (8th Cir. May 6, 1994) (forbidding the use of employer affidavits alone as proof that employee would not have been hired or would have been fired).

thus escaping any liability for the unlawful treatment of the erstwhile employee.

Wallace, 968 F.2d at 1180-81.

The ADEA, along with Title VII and antidiscrimination law in general, has two underlying purposes: making victims of discrimination whole and deterring future discrimination. See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Employees rely on effective interpretation and enforcement of these statutes as critically important tools for obtaining relief from invidious discrimination in the workplace. As a nation we rely on the developing body of antidiscrimination law to provide guidance and to prevent the occurrence of employer discrimination. Application of the after-acquired evidence doctrine to bar relief completely for discrimination victims undermines both of these purposes.

The following cases show how this doctrine works to insulate employers from the consequences of their discriminatory conduct by depriving individual victims of their full rights under the law. These cases illustrate the manifest unfairness of the doctrine and how it is used to frustrate the purposes of federal antidiscrimination law. Though the plaintiffs in these cases come from different walks of life and have alleged different types of discrimination, they all share one common characteristic—each has had serious allegations of job discrimination dismissed through the use of the after-acquired evidence doctrine.

A. Eileen Rich

Eileen Rich worked as a pre-printing technician at Westland Printers from November 1989 until March 1992, when Westland laid her off, asserting that its decision was based on poor economic conditions. *Rich v. Westland Printers*, No. HAR 92-2475, 1993 U.S. Dist. LEXIS 8526, at *2 (D. Md. June 9, 1993). Ms. Rich believed that Westland's decision to lay her off was based on sex discrimination. *Id.* She filed a lawsuit alleging,

inter alia, sex discrimination in violation of Title VII, claiming that her immediate supervisor, J.R. Westland ("J.R."), sexually harassed her and treated her less favorably than male employees. (Pl.'s Compl. at 1-8.)

Included in Ms. Rich's complaint were allegations that: J.R. displayed pictures of naked women on the wall, along with a poster exclaiming, "Sexual Harassment WILL be Tolerated!"; J.R. denigrated women who asked him questions with responses like "What the hell do you want now?" and "Can't you leave me alone?" but answered similar questions by male employees in a non-abrasive manner; and that J.R. remained silent when male employees were late to work or finished work behind schedule, yet would castigate women who did the same. *Id.* at 3-5.

Ms. Rich also alleged that men were promoted to other, higher-paying departments within the company while women were not. For example, Westland hired a male from outside the company to fill a position in a new, computerized division of the company, despite Ms. Rich's request for the job and a company policy of promoting and training from within. *Id.* at 7.

Ms. Rich asserted that J.R. fired her because she complained to others about his treatment of female employees. *Id.* at 6-7. She alleged that even though Westland claimed that her termination was necessary because business was slow, almost everyone in her department was required to work overtime, double overtime, and weekends to keep up with production—*after* she was discharged. *Id.* at 7.

Ms. Rich's serious allegations of sex discrimination and harassment were never presented at trial because Westland successfully used the after-acquired evidence doctrine to prevail on a summary judgment motion.⁴

⁴ On summary judgment,

[t]he facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favor-

Westland discovered during preparation for trial that Ms. Rich had indicated on her original employment application that she had an associate's degree in graphic communication, when in truth she did not. *Westland*, 1993 U.S. Dist. LEXIS 8526, at *10-11. The district court awarded summary judgment to the defendant on the basis of this after-acquired evidence. *Id.* at 18.

The district court determined that it need not consider the merits of Ms. Rich's discrimination claim because she *could have been* terminated for resume fraud. *Id.* at 11. Although Ms. Rich asserted—and Westland did not dispute—that an associate's degree was not necessary for the lithographic position that she had successfully performed for over two years, the court relied on Westland's affidavits that an employee who misrepresented facts in his or her employment application would have been terminated immediately. *Id.* at 17-18. Despite her serious allegations of sex discrimination and harassment, Eileen Rich's claims were never heard or considered due to the application of the after-acquired evidence doctrine.

B. Dorothea O'Driscoll

Dorothea O'Driscoll worked at Hercules, Inc. from January 1980 until she was terminated in April 1986. *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 657 (D. Utah 1990). After her termination, Ms. O'Driscoll

able to plaintiff, as the party opposing the motion The non-moving party is in a favorable posture, being entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered."

Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (citations omitted).

This principle applies equally to the cases discussed *infra* that were decided on summary judgment.

brought suit against Hercules, alleging, *inter alia*, age discrimination in violation of the ADEA.

Ms. O'Driscoll never got the opportunity to present her charge of discrimination before a judge or jury, however, because the trial court applied the after-acquired evidence doctrine in awarding summary judgment to Hercules. *Id.* at 661.

During preparation for trial, Hercules learned for the first time that Ms. O'Driscoll misrepresented her age, the ages of her children, the year of her high school graduation, and the fact that she had never previously applied to work for defendant.⁵ *Id.* at 657, 659.

Hercules was never required to defend against Ms. O'Driscoll's discrimination claim on the merits. Indeed, the court fully recognized that the motion for summary judgment had "nothing to do with the reasons for [her] termination." *Id.* at 657. Instead, Ms. O'Driscoll's allegations of age discrimination remained unheard—because six years earlier, she had led Hercules to believe that she was younger than she really was.

C. Patricia Milligan-Jensen

Patricia Milligan-Jensen was hired as a Public Security Officer for Michigan Technological University ("MTU" or "the University") in November 1987. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 303 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, and *cert. dismissed*, 114 S. Ct. 22 (1993). She was MTU's only female officer. *Id.* MTU terminated her three months later, purportedly due to an unsatisfactory rating during the initial probationary period. *Id.* Ms. Milligan-Jensen brought a Title VII suit, alleging that she was terminated

⁵ Ms. O'Driscoll acknowledged that she had misrepresented her age on her application but maintained that she had done so because she feared she would have been discriminated against had she revealed her correct age. *O'Driscoll*, 745 F. Supp. at 657.

on the basis of her sex and in retaliation for an EEOC complaint she filed during her employment. *Id.* at 302.

The district court held that the University treated Ms. Milligan-Jensen substantially differently than male officers. *Id.* at 303. For example, after the first month on the job, Ms. Milligan-Jensen was cited for a uniform code violation. *Id.* Her 30-day evaluation contained ratings in the "marginal" range, with a special reference made to her uniform violation. *Id.* A male officer who had received the same type of citation did not receive such ratings, nor did his evaluation refer to this violation. *Id.*

The court also found that Ms. Milligan-Jensen was re-assigned badge numbers and given Badge 37 because it had previously been assigned to women. *Id.* Furthermore, the court found that she was assigned to the "bump shift," which was essentially a meter maid position. *Id.* The male officers, on the other hand, were assigned "swing shifts" during which they patrolled the campus and responded to calls. *Id.*

When Ms. Milligan-Jensen met with her supervisor to request reassignment to a spot left vacant by another officer, her supervisor responded by saying, "You're the woman, aren't you?" and "You've got the lady's job. Don't you like it?" *Id.* Her supervisor documented these comments in her file, along with other criticisms of her work. *Id.* Ms. Milligan-Jensen called the EEOC regarding this incident (a call of which she alleges her supervisor was aware). *Id.* Two weeks later she filed complaints with the EEOC and the University. *Id.* Twelve days later she was fired, purportedly because of her unsatisfactory probationary period. *Id.*

During discovery in her Title VII lawsuit, defendants learned for the first time that Ms. Milligan-Jensen had been convicted five years before for driving under the influence of alcohol. *Id.* (citing *Milligan-Jensen v. Michigan Technological Univ.*, 767 F. Supp. 1403, 1410 (W.D.

Mich. 1991)). Although the district court held that Ms. Milligan-Jensen's omission on her employment application was a material falsification, it did not admit this after-acquired evidence on the issue of liability.

Instead, the district court judge found that there was direct evidence of sex discrimination and held that the University had failed to prove that it would have terminated Ms. Milligan-Jensen for non-discriminatory reasons. *Milligan-Jensen*, 975 F.2d at 303. The court then relied on the evidence of Ms. Milligan-Jensen's omission on her application to reduce by half the damages due her because of her discriminatory termination. *Id.* at 304.

On appeal, however, the Court of Appeals for the Sixth Circuit reversed. The court held that despite the district court's finding of discrimination, Ms. Milligan-Jensen suffered no legal injury because MTU would have fired her had it known of her falsification. *Id.* at 304-05.

Thus, even though a district court had concluded that Ms. Milligan-Jensen had been the victim of sex discrimination, the Sixth Circuit applied the after-acquired evidence doctrine to deny her any recovery and to insulate MTU from the consequences of its proven wrongdoing.

D. Heather Van Deursen

Heather Van Deursen worked as a consumer marketing representative for the U.S. Tobacco Sales & Marketing Co.'s ("USTS & M") smokeless tobacco company from September 1989 until her termination in January 1992. *Van Deursen v. U.S. Tobacco Sales & Mktg. Co., Inc.*, 839 F. Supp. 760, 761 (D. Colo. 1993). Ms. Van Deursen then filed a lawsuit alleging that during her employment, USTS & M management discriminated against her on the basis of sex in violation of Title VII. *Id.* Ms. Van Deursen alleged that her immediate supervisor, Stephen Danielski, harassed her and denied her the same rights, privileges and respect he afforded his male subordinates. (Pl's Compl. at 1-2.)

Soon after she was hired, Ms. Van Deursen claimed, Danielski informed her that two other women had previously worked for him, that neither had proved satisfactory, and that if she did not work out, he would never hire another woman. *Id.* at 1. Further, Ms. Van Deursen alleged that during a business meeting, Danielski told her that previous women employees had tried to seduce him for employment preferences; he also tried to discuss his sexual fantasies with her. *Id.* at 2. Ms. Van Deursen claimed that on another occasion Danielski harassed her about her personal life. *Id.* According to Ms. Van Deursen, he demanded to know with whom she was sleeping, requested the addresses and phone numbers of the places she was sleeping, and threatened to hire someone to obtain this personal information. *Id.* Ms. Van Deursen alleged that Danielski informed her that her failure to give him these personal details about her sexual activities would appear in her upcoming review as a "communication problem." *Id.*

Ms. Van Deursen claimed that at another company meeting in 1991, Danielski and two other managers confronted her, called her a "feminist," and warned her that she could get in a lot of trouble for raising harassment complaints. *Id.*

Ms. Van Deursen complained to management in writing about Danielski's sexual harassment, but she continued to suffer harassment and retaliation by him. In January 1992, USTS & M fired her, claiming that she misappropriated company funds and failed to adhere to company policy. *Id.*

In preparation for trial on the Title VII claim, USTS & M discovered what it claimed to be a discrepancy on her original employment application regarding her reason for leaving her previous employer, and used this "evidence" to defend against her sex discrimination charge. *Van Deursen*, 839 F. Supp. at 761. USTS & M disputed Ms. Van Deursen's statement on her application that she

left her former employer because she refused to take a pay cut. *Id.* at 761-62. Rather, USTS & M contended that Ms. Van Deursen's previous employer terminated her because of a discrepancy in her cash drawer. *Id.* at 761.

Ms. Van Deursen maintained that "pay cut" was an accurate characterization of her reason for leaving and disputed the existence of any cash discrepancy. *Id.* at 762-63.

Notwithstanding that the parties disputed the underlying facts surrounding her statement on the employment application, the court relied on the after-acquired evidence doctrine to award USTS & M summary judgment. *Id.* at 763. The court, relying on the affidavits of USTS & M management, held that Ms. Van Deursen's alleged misstatement on her application was material to its decision to hire her or, in the alternative, that USTS & M would have fired her had they been aware of the details of her departure from her previous employment. *Id.* As a result, Heather Van Deursen's serious allegations of sexual harassment, sex discrimination and retaliation were never heard. Instead, the court focused on alleged events surrounding a *previous* job—events that were unknown to the employer at the time it discharged Ms. Van Deursen and so in no way motivated its decision—to deny Ms. Van Deursen relief.

E. Rosie Bonger

Rosie Bonger worked at American Water Works Association (AWWA) from September 1988 until her termination in March 1990. *Bonger v. American Water Works Ass'n*, 789 F. Supp. 1102, 1104 (D. Colo. 1992). She claimed that AWWA's decision to fire her was the result of sex and race discrimination and retaliation in violation of Title VII. *Id.*

Ms. Bonger was hired into a newly-created Director of Human Resources position and was responsible, among

other things, for investigating discrimination complaints. *Id.* One of her initial assignments was to report on the compensation practices of AWWA. (Pl.'s 1st Am. Compl. at 2.) She developed a set of proposed salary ranges which she presented in a meeting of the Finance Committee in October 1988. *Id.* At this meeting, Ms. Bonger alleged that the Treasurer of AWWA verbally attacked her, telling her that her figures were inaccurate despite their earlier approval by her immediate supervisor, John Mannion. *Id.*

Ms. Bonger completed a report summarizing the compensation and hiring practices at AWWA in January 1989. *Id.* at 3. She concluded that AWWA placed minorities and women in lower-paying positions and that those few who were placed in management positions were paid considerably less than similarly situated white males. (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. at 6.) In her report, Ms. Bonger suggested several strategies by which AWWA could eliminate the discriminatory inequities. *Id.*

Ms. Bonger alleged that AWWA management then responded by engaging in "a course of conduct to retaliate against her, interfere with the performance of her job, isolate her and subject her to a hostile work environment based on her ethnicity and gender." *Id.* at 6-7.

Moreover, according to Ms. Bonger, Mannion subverted her efforts to respond to a number of employee allegations of discrimination by AWWA management. (Pl.'s 1st Am. Compl. at 3-5.) Ms. Bonger alleges that Mannion tried to engage her help in covering up these incidents by fabricating documents or whitening out evidence of overt discriminatory stereotyping. (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. at 7.) On another occasion, Ms. Bonger alleged that Deputy Executive Director Jack Hoffbuhr circumvented her authority and personally investigated an EEO complaint lodged against another manager. *Id.* at 8.

In February 1990, Ms. Bonger wrote Steve Merker, counsel for AWWA, for advice regarding the lack of management response to EEO complaints. *Id.* at 8-9. Merker suggested that Ms. Bonger take a paid leave of absence during his investigation because "he felt it important for her to remove herself from the workplace in order for him to conduct interviews of relevant individuals." *Id.* at 9. Ms. Bonger said that she complied only after Merker assured her that the leave of absence would not adversely affect her employment at AWWA. *Id.* On March 9, 1990, while Ms. Bonger was still on leave of absence, AWWA sent her a letter of termination. *Bonger*, 789 F. Supp. at 1104.

Ms. Bonger brought suit, asserting claims for sex and race discrimination and retaliation under Title VII. *Id.* She never received an opportunity to argue the merits of her claims, however, because AWWA was awarded summary judgment under the after-acquired evidence doctrine. *Id.* at 1107. During discovery, AWWA learned for the first time that Ms. Bonger had misrepresented her educational history on her employment application. *Id.* at 1104. She claimed to have earned a degree in business administration, but, in fact, had not. *Id.* at 1105. AWWA used this evidence to avoid substantive consideration of Ms. Bonger's Title VII claim. Relying on AWWA's "undoubtedly self serving" affidavit, the trial judge determined that a grant of relief to the plaintiff was precluded because of the after-acquired evidence doctrine. *Id.* at 1107.

F. Elizabeth Miller

Beneficial Management Corp. ("Beneficial") hired Elizabeth Miller as an Associate Counsel in its legal department in October 1980 when she was 62 years old. *Miller v. Beneficial Management Corp.*, 977 F.2d 834 (3rd Cir. 1992).⁶ After she resigned in October 1989,

⁶ The procedural history of this case is as follows: Defendant was initially granted summary judgment on other grounds, but

Ms. Miller filed a complaint alleging that Beneficial's discriminatory promotion practices amounted to constructive discharge under the ADEA and Title VII. *Id.* at 841.

In 1984, Beneficial transferred Ms. Miller to the government relations department, where she assumed the job responsibilities previously held by both the Vice President of Government Relations and Senior Vice President of Government Relations. *Id.* at 836. Although Ms. Miller received a salary increase with her transfer, she was paid less than both of the attorneys she replaced. *Id.* at 836-37.

When Ms. Miller was promoted in 1985 to Assistant Vice President, her salary was still below that of both attorneys whom she replaced. *Id.* at 837. Despite receiving additional responsibilities, praise, and positive recommendations from her immediate supervisor, Ms. Miller was denied promotion to Vice President in 1986 and again in 1987. *Id.* at 837-38.

In 1988, after successfully overseeing the government relations department during her supervisor's eleven-week leave of absence, Ms. Miller again requested a promotion to Vice President. *Id.* at 838. Her supervisor denied the promotion, allegedly stating that "[her] best bet [was] to leave and sue on age discrimination and to go work for the government, which could not discriminate on the basis of age." *Id.* Ms. Miller's supervisor later told her that

the Third Circuit reversed and remanded. *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 847 (3rd Cir. 1992) ("Miller I"). Upon remand, a magistrate then denied defendant's motion to amend its answer to include the after-acquired evidence defense. However, the District Court for the District of New Jersey reversed the magistrate and permitted the amended answer. See *Miller v. Beneficial Management Corp.*, No. 89-3089, 1993 U.S. Dist. LEXIS 19168, at *55 (D.N.J. Sept. 20, 1993). Ms. Miller's allegations of discrimination were discussed by the Third Circuit in *Miller I*.

she would never get the promotion to Vice President. *Id.* at 839.

Ms. Miller took a leave of absence the following month, and drafted a letter alleging unethical and discriminatory practices at Beneficial. *Id.* at 839-40. As a result of the letter, Beneficial undertook an internal investigation of Ms. Miller's employment history. *Id.* at 840.

Ms. Miller alleged that her supervisor stripped her of most of her duties upon her return to work, and in October, transferred her back to the legal department, foreclosing the possibility of future promotions. Ms. Miller then resigned and filed an ADEA suit. *Id.*

Beneficial moved for summary judgment on the basis of the after-acquired evidence defense. In preparation for trial, Beneficial for the first time discovered that Ms. Miller had misrepresented her date of birth on her employment application by three years. *Miller v. Beneficial Management Corp.*, No. 89-3089, 1993 U.S. Dist. LEXIS 19168, at *9 (D.N.J. Sept. 20, 1993). She claimed to have been born in 1931, when she was actually born in 1928. *Id.* In addition, Beneficial alleged that Ms. Miller had removed confidential documents without authorization for use in her lawsuit. *Id.* at 10. In support of its motion for summary judgment, Beneficial asserted that Ms. Miller never would have been hired had it known of her misrepresentations, or, in the alternative, that she would have been fired upon discovery of such misconduct. *Miller v. Beneficial Management Corp.*, No. 89-3089 letter op. at 7 (D.N.J. June 21, 1994).

Ms. Miller has not yet been able to present her case on the merits. Although the district court denied Beneficial's motion for summary judgment, the court validated the after-acquired evidence doctrine and remanded the case to the magistrate for a determination of whether Beneficial can prove that it would have fired Ms. Miller upon learning of her misconduct. *Id.* at 85.

G. Marie Russell

Microdyne, a manufacturer of computer products, hired Marie Russell in October 1990. *Russell v. Microdyne Corp.*, 830 F. Supp. 305, 306-07 (E.D. Va. 1993). She was terminated in July 1993. (Appellant's Br. for Appeal at 4.) She brought suit against Microdyne, alleging sex discrimination, sexual harassment, and retaliation in violation of Title VII. *Russell*, 830 F. Supp. at 306.

In her lawsuit, Ms. Russell alleged that Microdyne Senior Vice President Ralph Mason and others sexually harassed and otherwise discriminated against her. (Appellant's Br. for Appeal at 7-11.) Ms. Russell maintained that Mason refused to promote her solely because of her gender, despite her superior qualifications and recommendations from her division supervisor. *Id.* at 7.

Ms. Russell asserted that Mason repeatedly made sexist comments and remarks to women at Microdyne. Ms. Russell alleged, for example, that Mason referred to her as a "long-legged beauty;" he told her that when another female employee walked by "the earth stops moving;" he commented on whether women employees passed what he called "the wall test"—if a woman walked into a wall, whether her chest would hit first; he on one occasion told Ms. Russell that she looked sexy, and that "You must be looking for something or your husband must be away"; and he asked Ms. Russell whether another woman should be hired "because of her great legs." *Id.* at 7-8.

Ms. Russell alleged that she also was the target of unwanted sexual remarks from other Microdyne officials. She asserted that Richard Weavil, another Vice President, referred to her as "Wendy" because she reminded him of an old girlfriend who "really did something" for him. *Id.* at 8. Ms. Russell alleged that at a company party that she attended alone, Weavil said, "If I knew your husband wasn't coming, I would have left my wife at home." *Id.*

Ms. Russell further claimed that the Controller, Marshall Ellison, upon meeting with her to discuss a bonus, suggestively asked "What will you give me?" *Id.* She

alleges that Ellison also used a plastic hand to make crude gestures and to "touch" her on her head and back. *Id.* In addition, Ms. Russell says that Microdyne's President, Philip Cunningham, frequently referred to her as "sweetheart" or "baby," and on one occasion kissed her on the cheek. *Id.* at 8-9.

In February 1991, Ms. Russell complained to Microdyne's Manager of Human Resources. *Id.* at 9. Ms. Russell alleged that her complaint, instead of alleviating the discrimination, made it worse. *Id.* She claimed that Mason confronted her about her complaint, and that other men present taunted her such that she left the room in tears. *Id.*

In July 1991, Ms. Russell alleged that Mason called her into his office and sexually propositioned her. *Id.* Ms. Russell refused. *Id.* Shortly thereafter, she took a 14-day business trip. *Id.* Upon her return, Mason told her that he was reorganizing her division and that she would no longer have supervisory authority over a three-person staff. *Id.*

Ms. Russell received only a moderate salary increase in 1991, as compared to a number of similarly situated men in the company. *Id.* at 10. Ms. Russell alleged that her supervisor told her in early 1992 that he could not get a raise for her because Cunningham (Microdyne's president) believed that she made too much money for a woman. *Id.*

In her complaint Ms. Russell alleged sexual harassment, sexual discrimination and retaliation. *Russell*, 830 F. Supp. at 306. Microdyne sought summary judgment based on Ms. Russell's alleged misconduct, discovered after initiation of the lawsuit. *Id.* at 307. Microdyne argued that Ms. Russell had represented on her employment application that she worked full-time for another company, but that Microdyne had learned during discovery that she had worked only part-time. *Id.* The district court awarded Microdyne summary judgment on the basis of Microdyne's contention that had it been aware of this misrepresentation, Ms. Russell would never have been

hired, or, in the alternative, that upon discovery of the misrepresentation, she would have been fired. *Id.*

Marie Russell's case is currently on appeal in the United States Court of Appeals for the Fourth Circuit. Nos. 93-1895, 93-2078. A court has yet to rule on the merits of her underlying claims of sex discrimination, harassment and retaliation—solely because she told her employer that she had been employed full-time when she may have actually only worked part-time.

CONCLUSION

As these cases show, the after-acquired evidence doctrine too often works to insulate employers completely from answering for their discriminatory conduct. Under this doctrine, discrimination victims are barred from all recovery if their employers discover some unrelated past misconduct in preparing for trial on the discrimination claims. Indeed, this doctrine may well deter many victims of job discrimination from bringing their claims by the prospect of their employers scouring their background for evidence of misconduct. In this manner, the after-acquired evidence doctrine undermines the purposes of federal antidiscrimination law.

For the foregoing reasons, the Judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

The *Women's Legal Defense Fund* (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender. WLDF's participation as *amicus* in cases before this Court includes *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994), *UAW v. Johnson Controls*, 499 U.S. 187 (1991), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987), *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. Since its inception over 20 years ago, ERA has specialized in litigating employment discrimination cases. Allowing employers to excuse their discriminatory conduct by information discovered after that conduct would not only sanction the conduct, but would open up every victim of discrimination to intrusive and harassing investigations regarding all aspects of their lives.

The *National Council of Jewish Women, Inc.* (NCJW) is a volunteer organization, inspired by Jewish values,

that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 100,000 members in over 500 communities around the country. Based on NCJW's National Resolutions that include working for "employment policies which safeguard the dignity, rights, benefits, health and safety of all workers," we join this brief.

The *National Council of Negro Women, Inc.* (NCNW), established in 1935, is a voluntary non-profit membership organization committed to the advancement of educational, social and economic opportunities for African American women. Through our thirty-four National African American Women's affiliate organizations and 250 community-based sections in forty-two states, NCNW has an outreach to four million women. NCNW supports the position taken in this *amici curiae* brief, which argues that employers who allegedly illegally discriminate against an employee may not be absolved through the introduction of evidence against the plaintiff acquired after alleged discrimination occurred. As African American women, issues of discrimination and the affirmation of equal employment opportunity are our utmost critical concern.

The *National Organization for Women, Inc.* (NOW) is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in

numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination against women.

The *National Women's Law Center* (Center) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. In this connection, the Center has a particular interest in the vigorous enforcement of the nation's civil rights laws. Since 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's rights to equal protection under the law.

N.O.W. Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's rights. NOW LDEF was founded in 1979 by leaders of the National Organization for Women. A major goal of NOW LDEF's is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting such discrimination, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, (11th Cir. argued Dec. 2, 1992).

The *Older Women's League* is a non-profit membership organization whose primary mission is to advance the status of midlife and older women. Although midlife and older women represent the fastest-growing segment of the workforce, they continue to be underpaid and face the combined obstacles of age and sex discrimination. Because of this the Older Women's League has a significant interest in the disposition of *McKennon v. Nashville Banner Publishing Co.*

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote

and protect civil and constitutional rights. People For has joined this brief because of its concern about the harmful effects of the after-acquired evidence rule on preventing and combatting discrimination in the workplace, as well as its concern that some version of the rule could improperly be applied in censorship and other First Amendment litigation.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. *Women Employed* works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education.

The *Women's Law Project* (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sex discrimination from the workplace and the availability of strong and effective legal remedies for sex discrimination and other forms of illegal discrimination. WLP believes that the decision below will deter victims of job discrimination from seeking redress.

The *YWCA of the U.S.A.* is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through 400 YWCAs in 4,000 locations across the country. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth, leadership and power in order to attain a common vision: peace, justice, freedom and

dignity for all people. We advocate for public policies that ensure freedom from discrimination and oppression and promote equity in employment and the elimination of discriminatory treatment in the workplace. Therefore, the YWCA of the U.S.A. supports the position taken in this *amici curiae* brief.

JUL 21 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

CHRISTINE McKENNON,
Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,
*Respondent.*On Writ of Certiorari to the United States
Court of Appeals for the Sixth CircuitBRIEF OF
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW, THE AMERICAN CIVIL LIBERTIES
UNION, AND THE AMERICAN ASSOCIATION OF
RETIRED PERSONS
AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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36 PM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE LOWER COURT ERRED IN RULING THAT PETITIONER WAS NOT INJURED BY THE VIOLATION OF HER ADEA RIGHTS	6
II. CONGRESS DID NOT INTEND FOR AFTER-ACQUIRED EVIDENCE OF EMPLOYEE MISCONDUCT TO DENY ALL RELIEF FOR VIOLATIONS OF THE FAIR EMPLOYMENT LAWS	10
A. The After-Acquired Evidence Rule Is Inconsistent With the Text of the Fair Employment Laws	10
B. The After-Acquired Evidence Rule Defeats the Deterrent and Compensatory Purposes of the Fair Employment Laws	12
C. The After-Acquired Evidence Rule Has Been Rejected Under Other Federal Statutory Schemes	17
1. Employment-related statutes	17
2. Common-law fault-based defenses	22

	Page
III. AFTER-ACQUIRED EVIDENCE MAY AFFECT THE REMEDIES AVAILABLE IN PARTICULAR CASES	23
A. Backpay	26
B. Reinstatement and Front Pay	27
C. Compensatory Damages	29
D. Liquidated Damages	29
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
<i>ABF Freight System, Inc. v. NLRB</i> , ___ U.S. ___, 114 S. Ct. 843 (1994)	20
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	<i>passim</i>
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	15
<i>Anastasio v. Schering Corp.</i> , 838 F.2d 701 (3d Cir. 1988)	26
<i>Axelson, Inc.</i> , 285 N.L.R.B. 862 (1987) ...	20
<i>Bartek v. Urban Redevelop. Auth.</i> , 882 F.2d 739 (3d Cir. 1989)	26
<i>Bateman Eichler, Hill Richards, Inc. v. Berner</i> , 472 U.S. 299 (1985)	5, 22
<i>Bigelow v. RKO Radio Pictures, Inc.</i> , 327 U.S. 251 (1946)	27
<i>Bonger v. American Water Works</i> , 789 F. Supp. 1102 (D. Colo. 1992)	25
<i>Carter v. Sedgwick County, Kan.</i> , 929 F.2d 1501 (10th Cir. 1991)	28
<i>Cooper v. Federal Reserve Bank</i> , 467 U.S. 867 (1984)	6
<i>Duffy v. Wheeling Pittsburgh Steel Corp.</i> , 738 F.2d 1393 (3d Cir.), <i>cert. denied</i> , 469 U.S. 1087 (1984)	24
<i>Duke v. Uniroyal Inc.</i> , 928 F.2d 1413 (4th Cir.), <i>cert. denied</i> , 112 S. Ct. 429 (1991)	27, 28
<i>Floca v. Homcare Health Servs., Inc.</i> , 845 F.2d 108 (5th Cir. 1988)	28
<i>Ford Motor Co. v. EEOC</i> , 458 U.S. 219 (1982)	12, 13, 16
<i>Franklin v. Gwinnett County Public Schools</i> , 503 U.S. ___, 112 S. Ct. 1028 (1992)	29
<i>Franks v. Bowman Transp. Co.</i> , 424 U.S. 747 (1976)	<i>passim</i>

<i>Gibson v. Mohawk Rubber Co.</i> , 695 F.2d 1093 (8th Cir. 1982)	12, 26, 27
<i>Ginsberg v. Burlington Indus., Inc.</i> , 500 F. Supp. 696 (S.D.N.Y. 1980)	28
<i>Goldberg v. Bama Mfg. Corp.</i> , 302 F.2d 152 (5th Cir. 1962)	19
<i>Gypsum Carrier, Inc. v. Handelsman</i> , 307 F.2d 525 (9th Cir. 1962)	18
<i>Harris v. Forklift Systems, Inc.</i> , ___ U.S. ___, 114 S. Ct. 367 (1993)	29
<i>Hawley v. Dresser Indus., Inc.</i> , 958 F.2d 720 (6th Cir. 1992)	24
<i>Hazen Paper Co. v. Biggins</i> , 113 S. Ct. 1701 (1993)	7
<i>Hill v. Spiegel, Inc.</i> , 708 F.2d 233 (6th Cir. 1983)	26
<i>Houghton v. McDonnell Douglas Corp.</i> , 627 F.2d 858 (8th Cir. 1980)	28
<i>International Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977)	12, 27
<i>John Cuneo, Inc.</i> , 298 N.L.R.B. 856 (1990)	20
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	6, 19, 26
<i>McDonald v. Santa Fe Trail Transp. Co.</i> , 427 U.S. 273 (1976)	11, 27
<i>McDonnell Douglas v. Green</i> , 411 U.S. 792 (1973)	25, 27
<i>McKnight v. General Motors Corp.</i> , 908 F.2d 104 (7th Cir. 1990), cert. denied, 499 U.S. 919 (1991)	28
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57 (1986)	29
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 975 F.2d 302 (6th Cir. 1992), cert. dismissed, 114 S. Ct. 22 (1993)	3, 7
<i>Minneapolis, St. P. & S. Ste. M. Ry. v. Rock</i> , 279 U.S. 410 (1929)	18

<i>Mt. Healthy City School District Board of Education v. Doyle</i> , 429 U.S. 274 (1977) .	4, 8, 9, 23
<i>Newport News Shipbuilding & Dry Dock Co. v. Hall</i> , 674 F.2d 248 (4th Cir. 1982)	18
<i>Omar v. Sea-Land Serv., Inc.</i> , 813 F.2d 986 (9th Cir. 1987)	18
<i>Oscar Mayer & Co. v. Evans</i> , 441 U.S. 750 (1979)	12
<i>Perma Life Mufflers, Inc. v. International Parts Corp.</i> , 392 U.S. 134 (1968)	5, 22
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	4, 8
<i>Rodriguez v. Taylor</i> , 569 F.2d 1231 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978) ..	12, 15, 28
<i>St. Mary's Honor Ctr. v. Hicks</i> , 509 U.S. ___, 113 S. Ct. 835 (1993)	17, 20, 21
<i>Stacey v. Allied Stores Corp.</i> , 768 F. 2d 402 (D.C. Cir. 1985)	26
<i>Still v. Norfolk & W. Ry.</i> , 368 U.S. 35 (1961)	5, 17, 29
<i>Summers v. State Farm Mut. Auto Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	passim
<i>Taylor v. Teletype Corp.</i> , 648 F.2d 1129 (8th Cir.), cert. denied, 454 U.S. 969 (1981)	27
<i>Trans World Airlines, Inc. v. Thurston</i> , 469 U.S. 111 (1985)	6, 29, 30
<i>United States v. Burke</i> , 112 S. Ct. 1867 (1992)	24, 28
<i>United States Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711 (1983)	6
<i>Wallace v. Dunn Constr. Co.</i> , 968 F.2d 1174 (11th Cir. 1992)	passim
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<i>Welch v. Liberty Machine Works</i> , 1994 U.S. App. LEXIS 10028, 23 F.3d 1403 (8th Cir. Jan. 13, 1994) ...	24, 25

STATUTES:

	Page
Age Discrimination in Employment Act,	
29 U.S.C. § 621 <i>et seq.</i>	<i>passim</i>
§ 4(a), 29 U.S.C. § 623(a)	6
§ 7(b), 29 U.S.C. § 626(b)	11, 29
Civil Rights Act of 1991, adding	
Rev. Stat. § 1977A, 42 U.S.C. § 1981a . .	29
Fair Labor Standards Act,	
29 U.S.C. § 201 <i>et seq.</i>	11
Title VII of the 1964 Civil Rights Act,	
42 U.S.C. § 2000e <i>et seq.</i>	<i>passim</i>
§ 703(a), 42 U.S.C. § 2000e-(2)(a)	6
§ 703(j), 42 U.S.C. § 2000e-(2)(j)	24

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Page

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Mesritz, George C., <i>"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims</i> , 18 Employee Rel. L.J. 215 (1992)	14
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Witus, Morley, <i>Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations</i> , 69 Mich. B.J. 50 (1990)	14

INTEREST OF THE *AMICI CURIAE*¹

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization that was established at the request of the President of the United States in 1963 to involve leading members of the bar throughout the country in the national effort to ensure civil rights to all Americans. The disposition of the case at bar, arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, will affect the availability of relief to victims of unlawful employment practices under other federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other antidiscrimination statutes. The Lawyers' Committee has represented, and has assisted other lawyers in representing, numerous plaintiffs in administrative proceedings and lawsuits under Title VII in the lower courts. See, e.g., *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Labs., Inc.*, 673 F.2d 798 (5th Cir. 1982).

The Lawyers' Committee has also represented parties and participated as *amicus curiae* in ADEA and Title VII cases before this Court. See, e.g., *Gilmer v. Interstate/Johnson Lake Corp.*, ___ U.S. ___, 112 S. Ct. 1647 (1991); *Landgraf v. USI Film Prods.*, ___ U.S. ___, 114 S. Ct. 1483 (1994); *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The Committee appeared most recently as an *amicus* in *ABF Freight System, Inc. v. NLRB*, ___ U.S. ___, 114 S. Ct. 843 (1994), in which the petitioner contended that the "after-acquired evidence" rule established in cases arising under Title VII should curb the remedial powers of the NLRB.

¹ The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

The Lawyers' Committee is interested in this case because the lower courts' misapplication of the after-acquired evidence rule is substantially harming the enforcement of Title VII as well as the ADEA, and is materially reducing the incentive of employers to eliminate discrimination.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination from our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination under law. In pursuit of that goal, the ACLU has represented parties and participated as *amicus curiae* in numerous anti-discrimination cases before the Court, including, during the last ten years, *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) and *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed, most of whom are protected by the ADEA and Title VII of the Civil Rights Act of 1964. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal courts of appeals, and filed an *amicus* brief in support of the grant of certiorari in this case.

SUMMARY OF ARGUMENT

The question presented in this case is whether Congress intended the courts to provide a remedy for unlawful employment discrimination visited on employees who would not have been hired, or who would have been fired, for some legitimate reason unknown to the employer when it committed its discriminatory act but learned in time to be offered as a defense in the employee's suit. In the typical case the subsequently learned legitimate reason (or "after-acquired evidence") is that the employee obtained his or her job through some kind of deceit or, as here, has engaged in on-the-job misconduct warranting dismissal.² The role Congress intended after-acquired evidence to play in these cases must be found in the language and purposes of the ADEA. The court below, however, without mentioning either the text or any perceived policy of the Act, denied all relief on the theory that respondent's violation of the Act was not the legal cause of petitioner's injury.

The lower court's ruling springs from the Tenth Circuit's decision in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988).³ There the full extent of an employee's falsification of company records came to light only after he filed an ADEA and Title VII suit against his employer for dismissing him on the basis of religion and age. The Tenth Circuit wrote that, although the previously unknown falsifications "could not have been a

² See Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. Rev. 49, 50 nn.3-4, 57 & n.27 (1993) (collecting cases).

³ The Sixth Circuit adopted *Summers* in *Johnson v. Honeywell Info. Sys., Inc.* 955 F.2d 409, 415 (6th Cir. 1992), and followed it in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 304 (6th Cir. 1992), cert. dismissed, 114 S.Ct. 22 (1993), and in the decision below. Pet. App. 5a-7a.

'cause' or 'reason' for [plaintiff's] discharge," it would be "utterly unrealistic" to ignore them and they should be "considered in determining what relief, or remedy, is available to [plaintiff]." 864 F.2d at 704, 708. The Tenth Circuit did not, however, undertake that consideration in light of the text or purposes of the fair employment laws. Instead it cited this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), for the proposition that, if a worker who had engaged in so-called resume fraud would not have been hired (or, in the case of on-the-job misconduct, would have been fired) had the true facts been known, then he or she suffers no legal injury from being discharged for discriminatory reasons.

The Tenth Circuit misread *Mt. Healthy*. That decision established that, when an employer bases an employment decision on both legitimate and illegitimate reasons, it can avoid liability if it can prove that it would have made the same decision based on the legitimate reason alone. As the Court made clear in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989), however, the proffered legitimate reason must have actually motivated the employer at the time it took the disputed action.

In this case, as in all after-acquired evidence cases, the employer by definition was unaware of, and thus could not have been motivated by, the after-acquired legitimate reason at the time it committed its discriminatory acts. Hence the forbidden conduct alleged in the complaint and assumed by the courts below -- the denial of raises, harassment, and ultimate discharge of petitioner because of her age -- caused petitioner to suffer precisely the type of injury the Act was designed to redress: the deprivation of wage earning opportunities because of discrimination.

Accordingly, as the Eleventh Circuit recognized in *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992), the question the court below should have addressed is whether, despite the existence of a violation, Congress meant for victims of employment discrimination to be denied all relief automatically because of their own misconduct. The Eleventh Circuit correctly ruled that Congress could not have intended that result because, as a complete bar to relief, the after-acquired evidence rule hinders rather than advances the deterrent and compensatory purposes of the fair employment laws by allowing intentional discrimination to go without sanction, leaving victims worse off than if no violation had occurred, creating an inducement for employers to engage in reprehensible employment practices, and discouraging discrimination victims from enforcing their rights.

Our view is reinforced by many decisions, including *Still v. Norfolk & W. Ry.*, 368 U.S. 35 (1961), refusing to recognize after-acquired evidence of employee misconduct as a bar to all remedies under other statutes authorizing employment-related relief, and by *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985), and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), refusing to recognize common law fault-based defenses to violations of federal statutes Congress intended would be enforced by private actions.

~~Although after-acquired evidence cannot bar all relief,~~ the proper application of the remedial principles embodied in the fair employment laws suggests that it may limit the availability of make-whole relief in particular cases. The victims of a discriminatory employment decision are not entitled to relief beyond the point when the same decision would have been made for nondiscriminatory reasons. Accordingly, after-acquired evidence of misconduct may serve in particular cases to terminate backpay and certain compensatory damages sooner than would otherwise be the

case, and to bar reinstatement and front pay entirely. It should not, however, affect the availability of punitive damages, which are awarded solely on the basis of the employer's understanding of the unlawfulness of his own conduct.

ARGUMENT

I. THE LOWER COURT ERRED IN RULING THAT PETITIONER WAS NOT INJURED BY THE VIOLATION OF HER ADEA RIGHTS

Section 4(a) of the ADEA, 29 U.S.C. § 623(a), together with § 703(a) of Title VII, 42 U.S.C. § 2000e-(2)(a), make it unlawful for an employer --

to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

age, race, religion, sex, or national origin. (Emphasis added).⁴ As the words "because of" plainly indicate, the critical inquiry at the liability phase of an individual disparate treatment case "is the reason for a particular employment decision." *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 8765 (1984). That presents a question of historical fact, requiring a determination of "what the state of a man's mind at a particular time is." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (internal quotation marks and citation omitted). If the employment

⁴ As a rule, interpretations of Title VII apply with equal force to the ADEA, "for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

decision at issue was made "because of" a prohibited factor, the statute has been violated, for "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993) (emphasis added).

Since by definition after-acquired evidence of misconduct is unknown to the employer at the time of the challenged employment decision, that evidence cannot possibly have been the reason for the decision. Hence it cannot bear on whether the employer has committed an unlawful employment practice. Indeed, none of the courts that has denied all relief on the basis of such evidence, including the courts below, appears to take a contrary view.⁵

Rather, these courts hold that after-acquired evidence mandates the denial of all relief notwithstanding the existence of a statutory violation on the theory that the violation was not the legal cause of the employee's injuries. In *Milligan-Jensen*, for example, the Sixth Circuit "regard[ed] the problem as one of causation" and adopted the view that, "if the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification [on her job application], the plaintiff suffered no legal damage by being fired." 975 F.2d at 304-5. And in the instant case the Sixth Circuit wrote that, "because it was undisputed that

⁵ The courts below ruled as they did on the assumption that petitioner was "subjected to age discrimination." Pet. App. 13a, 3a. See also *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 305 (6th Cir. 1992) (whether plaintiff was discriminated against was "irrelevant"); *Summers v. State Farm Mut. Auto. Inc. Co.*, 864 F.2d 700, 708 (10th Cir. 1988) ("[W]hile such after-acquired evidence cannot be said to have been a 'cause' for [plaintiff's] discharge in 1982, it is relevant to [his] claim of 'injury,' and does itself preclude the grant of any present relief or remedy."); *Washington v. Lake County, Ill.*, 969 F.2d 250, 255 (7th Cir. 1992) ("[The defendant] allows us to assume that it discriminated against [plaintiff] because of his race.").

[petitioner] was guilty of misconduct, prior to her discharge, that would, if known by [respondent], have caused her discharge * * * [petitioner] did not suffer injury from the claimed violation" of her ADEA rights. Pet. App. 3a. By this the court presumably meant that, because petitioner would have been discharged lawfully had her misconduct been known, the unlawful discharge was not the legal cause of her injuries.

The lower court's causation theory was first articulated by the Tenth Circuit in *Summers*, which mistakenly found it warranted by this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).⁶ In *Mt. Healthy* the Court held that an employer who bases an employment decision on a mixture of legitimate and illegitimate motives can avoid liability by showing "that it would have reached the same decision" based on the legitimate reasons alone. 429 U.S. at 287. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court adopted the same test of liability in mixed-motive cases arising under Title VII, but in so doing firmly rejected the idea that an employer can prevail by offering a legitimate reason for its decision that it did not discover until later. As Justice Brennan explained for the plurality:

An employer may not * * * prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. * * * The very premise of a mixed motive case is that a legitimate reason was present * * *.

Id. at 252. See also *id.* at 260-61 (White, J., concurring in the judgment); *id.* at 266-67 (O'Connor, J., concurring in the

⁶ See *Summers*, 864 F.2d at 705-06, 707 n.3 (describing *Mt. Healthy* as "the linchpin case" in this area).

judgment).

Accordingly, mixed-motive cases are no help to employers in after-acquired evidence cases, in which it is always undisputed that the legitimate reason offered for the employer's action was not known to the employer at the time of, and hence could not actually have motivated, that action. It follows that, in this case, the after-acquired legitimate reason for petitioner's discharge cannot alter the conclusion that age discrimination caused her to lose the wages she would have earned in the absence of respondent's violation of the Act. The loss of those wages is precisely the kind of injury that the fair employment laws were designed to redress.

Apart from its reliance on *Summers*, the lower court offered no explanation for its unorthodox theory of causation. In particular, it made no attempt to explain how its concept of causation would promote or even be consistent with the purposes of the ADEA. The court's aim was not to implement the congressional directive that the employee be made no worse off as a result of discrimination, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting 118 Cong. Rec. 7168 (1972); cf. *Mt. Healthy*, 429 U.S. at 285-86, but rather to apply the general equitable principle that a plaintiff be made no better off as a result of his or her own misconduct. In the end its conclusion reflected not so much a rule of causation as a policy decision preferring one wrongdoer over another.⁷

⁷ Strictly speaking, the lower court's causation theory would relieve employers of liability whenever any legitimate reason for firing or not hiring the employee, including reasons having nothing to do with employee misconduct, surfaced after the employer's discriminatory act - such as the discovery that the employer had mistakenly given the employee a passing grade on the job application test, or that over time, unbeknownst to all, the employee's eyesight had deteriorated below standards required by the job. As petitioner demonstrates in her brief,

Our quarrel with the lower court's approach is not that it gives weight to the employee's misconduct, but that it gives it exclusive weight. Instead of treating the misconduct as a factor to be considered in shaping an equitable remedy consistent with the statutory purposes, it treats it as a basis for denying causation and therefore liability. That approach disregards altogether that discriminatory employment actions have occurred which caused, in any ordinary sense, economic loss to the employee -- the very situation Congress sought to redress. The better approach would have been to acknowledge that the employer committed violations that ordinarily would call for complete relief and then consider whether Congress intended a different result on account of the after-acquired evidence of employee misconduct. We turn now to that question.

**II. CONGRESS DID NOT INTEND FOR
AFTER-ACQUIRED EVIDENCE OF EMPLOYEE
MISCONDUCT TO DENY ALL RELIEF FOR
VIOLATIONS OF THE FAIR EMPLOYMENT LAWS**

**A. The After-Acquired Evidence Rule Is Inconsistent With
The Text of The Fair Employment Laws**

The lower court's ruling effectively excludes numerous employees from the coverage of the fair employment laws. It deems these workers incapable of suffering injury on account of unlawful discrimination regardless of the nature of the discrimination or its consequences for the workers and for society. In this case, for example, the court held that, because petitioner copied confidential records, she did not suffer a redressable injury even assuming the truth of her

the limitless sweep of that rule of causation would eviscerate the fair employment laws and we do not read the Sixth Circuit to have adopted it. Rather, along with other lower courts, the Sixth Circuit's rule seems rooted in notions of morality as well as causation, and hence restricted to cases of after-acquired evidence of employee misconduct.

allegations that respondent denied her raises, harassed her, and ultimately dismissed her on the basis of age.

Nothing in the language of the fair employment laws suggests that Congress meant to exclude from their protection workers who have obtained their jobs through some kind of deceit or retained them despite having engaged in some form of misconduct unknown to the employer. The liability provisions of those statutes make it unlawful to discriminate against "any individual" on the basis of prohibited factors. This Court has given these words their ordinary, everyday meaning, holding that Title VII makes no "exception for any group of particular employees." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976).

The remedial provisions of the fair employment laws likewise contain no suggestion that Congress meant to deny a remedy to workers who conceal disqualifying characteristics. Once a violation of the Act is established, "[a]mounts owing * * * as a result," such as back wages and benefits, are to be treated as "unpaid minimum wages or unpaid overtime compensation" under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 626(b). If the violation is willful, the plaintiff is entitled to an additional equal amount as liquidated damages. *Id.*, incorporating by reference 29 U.S.C. § 216(b). In addition, ADEA courts are authorized to

grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts

deemed to be unpaid minimum wages or unpaid overtime compensation under this section. *Id.*

Although this language accords district courts a measure of discretion, Congress granted that discretion "to allow the most complete achievement of the objectives of [the statute] that is attainable under the facts and circumstances of the particular case." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976) (Title VII). Hence in fashioning a remedy "a court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 233 (1982) (internal quotations omitted) (Title VII); *Albemarle Paper*, 422 U.S. at 421 (discretionary power to award backpay granted "to make possible the fashioning of the most complete relief possible")(internal quotes and brackets omitted) (Title VII).

B. The After-Acquired Evidence Rule Defeats the Deterrent and Compensatory Purposes of the Fair Employment Laws

The ultimate objective of both the ADEA and Title VII is the eradication of discrimination in the workplace. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (ADEA); *Rodriguez v. Taylor*, 569 F.2d 1231, 1236 (3d Cir. 1977) (ADEA); see also *Albemarle Paper*, 422 U.S. at 415. Both statutes seek to achieve that goal through policies of deterrence and restoration.⁸ Make-whole relief (such as backpay) is essential to both policies. As this Court observed

⁸ See *Albemarle Paper Co.*, 422 U.S. at 417; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (Title VII); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982) (ADEA seeks "to make persons whole for injuries suffered as a result of unlawful employment discrimination").

in *Albemarle Paper*, "[i]t is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of their discriminatory practices. 422 U.S. at 418-419 (citation omitted). And in *Ford Motor Co.* this Court said that forcing an employer who has broken the law to pay the wages and benefits lost by the victim of his discrimination gives him a powerful incentive to avoid future violations, for "paying backpay damages is like paying an extra worker who never came to work." 458 U.S. at 229. These decisions recognize that the deterrent and make-whole purposes of the fair employment laws are mutually reinforcing, and that compensating victims of discrimination is critical to both, "for requiring payment of wrongfully withheld wages deters further wrongdoing at the same time that their restitution to the victim helps make him whole." *Franks*, 424 U.S. at 786 (Powell, J., concurring and dissenting).

The rule adopted by the court below, insulating lawless employers from the Act's remedial scheme, hinders rather than advances the restorative and deterrent policies of the ADEA and Title VII. The compensation-denying result of the rule is most immediately obvious, but its adverse effect on deterrence is no less severe. As the Eleventh Circuit observed in *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1180 (11th Cir. 1992), the after-acquired evidence rule

does not encourage employers to eliminate discrimination. Rather, it invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because [the rule] gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and

then manufacturing a 'legitimate' reason for the discharge that fits the flaws in the employee's background.

The concerns expressed by the *Wallace* court are not fanciful. Employers, human resource professionals, and their attorneys are by now fully informed of the potential for the use of after-acquired evidence to avoid liability for discrimination.⁹ Moreover, employers have reason to believe that an intensive investigation of an ex-employee's job application may well reveal some misstatement of fact, even in the case of employees who have performed satisfactorily since their hire.¹⁰

⁹ See, e.g., Jonathan Groner, *New Defense for Bias Suits: Attack*, Fulton County Daily Report [for local attorneys], Mar. 12, 1993, at 1 (The doctrine of after-acquired evidence "permits [an employer] to trump discrimination charges by using dirt about an employee dug up after his termination"); George D. Mesritz, "After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims, 18 Employee Rel. L.J. 215, 224 (1992) (instructing employers to subpoena the ex-employee's physicians and mental health care professionals for evidence of illicit drug use, and to contact courts located where the employee has resided); David A. Maddux & Douglas A. Barritt, *Employees' Lies Can Backfire: Misconduct May Bar Employment Suits*, Nat'l L.J., May 10, 1993, at 25, 29 ("[T]he employer * * * should leave no stone unturned in trying to identify any misrepresentations or misconduct by the employee."); Morley Witus, *Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations*, 69 Mich. B.J. 50, 51 (1990) ("In defending discrimination and retaliation claims, again the focus should not be on the employer's motive for discharging the employee.").

¹⁰ See, e.g., *Many Falsify Credentials, Qualifications*, Atlanta Constitution, May 11, 1992, at B5 ("resume fraud is rampant among job seekers"); Kenneth Labich, *The New Crisis in Business Ethics*, Fortune, April 20, 1992, at 167, 176 (surveys of Americans between 18 and 30 years old show that "between 12% and 24% say they included false information on their resumes"); Dennis Kelly, *Lies Part of Students' Lives*, USA Today, Nov. 13, 1992, at 1 (33% of high school and college students surveyed

The lower court's rule also impedes the deterrent aims of the fair employment laws by discouraging actions by private litigants, whom Congress has cast in the role of private attorneys general.¹¹ The after-acquired evidence rule invites employers to conduct a wide-ranging and potentially humiliating investigation into the personal and professional background of every claimant. The inevitable result will be that employees who would otherwise challenge unlawful employment practices may tolerate them instead. That is especially true of employees who are aware of a blemish on their records that could surface during discovery, but even employees with nothing to hide might reasonably

indicated that they are willing to lie on a resume); Steve Brunsman, *Resume Fraud, Lying Not at All Uncommon*, Houston Post, Sept. 26, 1992, at E2; Joan E. Rigdon, *Deceptive Resumes Can Be Door-Openers But Can Become an Employee's Undoing*, Wall St. J., June 17, 1992, at B1; Dale Crider, *Resume Fraud Complicates Firing Claims*, Nat'l L.J., Dec. 7, 1992, at 17 ("In today's employment market, resume fraud is an increasingly serious problem. * * * One in 10 employers reportedly has discovered applicants lying on resumes, and a close examination undoubtedly would uncover many more instances of applicants misrepresenting their qualifications.").

¹¹ In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), the Court said that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII" and "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." The same is true under the ADEA. *Rodriguez v. Taylor*, 569 F.2d at 1245 (granting attorney's fees to ADEA plaintiff and noting that "congressionally approved awards are designed to encourage private enforcement of individual rights and to deter socially harmful conduct").

The Director of the Administrative Office of the U.S. Courts has reported that a total of 10,771 private fair employment lawsuits were filed in FY 1992, compared with only 440 filed by government enforcement agencies. Annual Report of the Director of the Administrative Office of the United States Courts, Table C2, Appendix I, at 179 (Sept. 30, 1992).

decide to abide unlawful practices rather than subject themselves to intrusive personal investigations. The end result will harm not only the employees in question but also their colleagues in the workplace, who benefit each time an employee vindicates the public policy against employment discrimination.

Finally, the rule adopted below, legitimatizing the employer's resort to discovery into the employee's background, will further snarl the litigation process and shift the focus from issues important under the fair employment laws to collateral matters. This Court has already deplored the slow pace of Title VII lawsuits, in which delays "are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Ford Motor Co.*, 458 U.S. at 228. The court of appeals' rule will make matters worse. Both prospective plaintiffs and their attorneys, who frequently handle discrimination claims on a contingency basis, will be discouraged from running the litigation gantlet, and as enforcement efforts are weakened so is the overall deterrent force of the Act. The adverse impact on deterrence is bound to increase as more violations of the Act go unpunished, and the proliferation of cases in which employers offer after-acquired evidence to avoid paying for their discriminatory actions shows that the court of appeals' rule may in fact immunize outlaw employers in a significant number of cases.

In sum, the after-acquired evidence rule finds no support in either the text or the policies of the fair employment laws. It wrongly insulates discriminatory employers from responsibility and thereby diminishes their "incentive to shun practices of dubious legality," *Albemarle Paper*, 422 U.S. at 417; it leaves victims of intentional discrimination uncompensated; it will chill private enforcement actions; it will encourage reprehensible conduct

by employers; and it will contribute to litigation complexity and delay. By contrast, what can be said on behalf of the after-acquired evidence rule -- that it punishes employees who have gained their jobs through deceit or retained them despite undiscovered on-the-job misconduct -- is irrelevant to the ADEA and Title VII. Those laws were not enacted to adjust employer-employee relationships in accord with all of the rights and duties that may flow between them. Cf. *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, ___, 113 S.Ct. 2742, 2754 (1993) ("Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that.").

C. The After-Acquired Evidence Rule Has Been Rejected Under Other Federal Statutory Schemes

Two lines of decisions, one dealing particularly with laws that require employers to compensate workers for employment-related injuries and the other broadly defining the role of fault-based defenses to federal statutory causes of action, have concluded that achievement of Congress's will takes priority over competing policies based on the plaintiff's misconduct.

1. **Employment-related statutes.** The after-acquired evidence of misconduct issue has arisen under a variety of federal statutes governing employer-employee relations, and over the years the courts and agencies responsible for implementing those statutes have devised rules for handling that issue in light of the statutory policies at stake. The general rule to have emerged is that after-acquired evidence cannot bar a claim altogether but may limit the availability of particular forms of relief.

In *Still v. Norfolk & W. Ry.*, 368 U.S. 35 (1961), this Court held that a railroad cannot escape its obligation under the Federal Employers' Liability Act to pay damages for personal injuries negligently inflicted upon a worker by

proving that the injured worker had obtained his job by making material misrepresentations on which the railroad relied in hiring him. The Court thereby effectively overruled *Minneapolis, St. P. & S. Ste. M. Ry. v. Rock*, 279 U.S. 410 (1929), which had denied such relief on public policy grounds to an injured worker who obtained employment through means that struck the Court as particularly outrageous.¹² The Court wrote in *Still* that "considerations of public policy of the general kind relied upon by the Court in *Rock* cannot be permitted to encroach further upon the special policy expressed by Congress in the Act," which is that workers be compensated for their injuries. *Id.* at 44-45. Hence, "the status of employees who become such through other kinds of fraud * * * must be recognized for purposes of suits under the Act." *Id.* at 45. The Court noted, however, that application fraud might serve to limit relief in appropriate cases, such as where the employee concealed evidence of a pre-existing injury for which he later sought compensation from the railroad. *Id.* at 46 n.14.¹³

¹² The plaintiff in *Rock* obtained his job after being rejected for health reasons by reapplying under a false name and enlisting a stand-in for the medical exam. Although *Still* did not overrule *Rock* in so many words, it held that "*Rock* must be limited to its precise facts" and suggested that those facts "may never arise again." 368 U.S. at 44.

¹³ The lower federal courts have reached the same conclusion regarding after-acquired evidence of misconduct in cases arising under the Jones Act and the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). See *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 252 (4th Cir. 1982) (holding that the "specific legislative policy favoring compensation of injured employees" embodied in the LHWCA "overrides the general considerations surrounding an allegedly fraudulent formation of the employment relationship"); *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 990 (9th Cir. 1987) (Jones Act); *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 530-31 (9th Cir. 1962) (same).

In *Goldberg v. Bama Manufacturing Corp.*, 302 F.2d 152 (5th Cir. 1962), decided under the FLSA, an employee discharged for having reported wage and hour violations was discovered to have engaged in serious job-related misconduct, including forgery of production slips, theft, and time clock abuses.¹⁴ The Department of Labor, charged with administering the statute, argued that reinstatement and backpay were nonetheless appropriate. The court viewed the case as presenting "a collision of two strong policies, one against condoning violations of the Act and the other against forcing an employer to keep unfit employees." *Id.* at 156. It reasoned that the congressional goal of eliminating violations would be frustrated by a rule mandating the denial of all relief, since "[t]he purposes of the [FLSA] require that employees throughout the country feel confident that they may bring a complaint to the Department of Labor without being penalized by their employers," and denying all relief would necessarily leave other workers with the impression that the employer "discharged an employee in violation of the Act and the district court allowed the employer to get away with it scot free." *Id.* Yet the court also acknowledged "half a dozen reasons why [the plaintiff] should have been discharged." *Id.* at 154. It concluded that "the conflicting policies present in this case would best be balanced" by an award requiring reimbursement but denying reinstatement. *Id.* at 156.

The National Labor Relations Board has similarly concluded that the national labor policy is best served by a rule allowing after-acquired evidence of employee

¹⁴ The *Goldberg* decision is particularly significant because it was part of the body of case law interpreting the FLSA's remedial provisions that existed when Congress was drafting the ADEA. This Court has acknowledged that Congress was aware of those judicial interpretations and meant to incorporate them into the ADEA. *Lorillard v. Pons*, 434 U.S. at 580-81.

misconduct to limit relief but not bar it entirely. In *Axelson, Inc.*, 285 N.L.R.B. 862 (1987), two strikers who were unlawfully deprived of their jobs had previously engaged in strike misconduct which, if known by their employer, would have resulted in their lawful discharge. Seeking to "balance [its] responsibility to remedy unfair labor practices and [its] policy of discouraging strike misconduct," the Board denied reinstatement but awarded backpay up until the date the employer acquired knowledge of the misconduct (and would legitimately have discharged the workers). *Id.* at 866 & n.11. Similarly, in *John Cuneo, Inc.*, 298 N.L.R.B. 856 (1990), the Board considered the case of a worker who would not have been hired but for a material falsification on his resume, but who, absent discrimination, would have remained employed until the falsification was discovered. Once again seeking to "balance [its] responsibility to remedy the [employer's] unfair labor practice against the public interest in not condoning [the worker's] falsification of his employment application," the Board denied reinstatement but ordered backpay up until the date that the falsification was discovered. *Id.* at 856.

This Court's recent ruling in *ABF Freight System, Inc. v. NLRB*, ___ U.S. ___, 114 S. Ct. 835 (1994), suggests that it would uphold these Board decisions. There the Court upheld the Board's grant of reinstatement and back pay relief to a union supporter who had been fired because of anti-union animus but who had lied to his employer and had perjured himself in the Board's administrative proceedings. The Court rejected a rule barring all individual relief where employee misconduct or perjury had occurred, citing *St. Mary's Honor Ctr.*, 113 S.Ct. at 2754, as supporting the Board's decision to rely on "'other civil and criminal remedies' for false testimony, rather than a categorical exception to the familiar remedy of reinstatement." 114 S. Ct. at 840.

The Court's discussion of the policies at stake in that case applies equally to cases brought under the ADEA and Title VII.¹⁵ It ruled that the Board had not abused its discretion in awarding relief because (1) the Board was under no obligation to adopt a rigid rule foreclosing relief in all such cases; (2) it could not "fault the Board's conclusion[] that [the employee's misconduct] was ultimately irrelevant to whether antiunion animus actually motivated his discharge"; and (3) it could not fault the Board's conclusion that "ordering effective relief in a case of this character promotes a vital public interest"; and (4) a rule denying all relief because of employee misconduct "might force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility." *Id.*

Finally, the EEOC has determined that the national goal of equal employment opportunity would best be served by a rule that after-acquired evidence of misconduct cannot bar relief entirely but may limit the availability of particular remedies. Under the EEOC's Revised Enforcement Guide, an employer may be shielded from an order of reinstatement and from backpay accruing after the discovery of the legitimate reason for discharge. The employer is still subject, however, to awards of backpay and compensatory damages covering the period of time up to the discovery of the misconduct, as well as punitive damages. *EEOC: Revised Enforcement Guide on Recent Developments in Disparate*

¹⁵ *Albemarle Paper* held that Title VII's "backpay provision was expressly modeled on the backpay provisions of the National Labor Relations Act" and that Congress intended the courts to follow the Board's practices in making backpay awards. 422 U.S. at 419-20 and 422 N.16.

Treatment Theory, Fair Empl. Prac. Man. (BNA) 405:6915, 6926-27 (1992) ("EEOC Revised Enforcement Guide").

2. Common-law fault-based defenses. The second line of relevant cases includes *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968), in which the Court refused to apply the common law doctrine of *in pari delicto* as a defense to actions under the antitrust laws, overruling the circuit court's holding that the plaintiffs were barred from recovery because they had participated in the very antitrust violations for which they sought redress. The Court noted that "[t]here is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to [private] actions" and that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating" a violation. *Id.* at 138, 139. In the end it did not matter that the plaintiffs "may be subject to some criticism for having taken any part in [defendants'] allegedly illegal scheme and for eagerly seeking" more profits, *id.* at 139-40, for the importance of private enforcement of the antitrust laws carried the day.

The Court reached the same result on similar reasoning under the securities laws in *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307 (1985). It stressed the importance of private actions in the enforcement of those laws and noted that it has "emphasized 'the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes.'" *Id.* at 307 (quoting *Perma Life*). It held that denying the *in pari delicto* defense would best serve the purposes of the federal securities laws because barring private actions "would inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied." *Id.* at 315.

Those decisions preclude the recognition of a fault-based defense here, for private enforcement actions under the ADEA and Title VII are essential to their enforcement. See note 12, *supra*. Moreover, if plaintiffs who have violated the very statutes they sue to enforce are not barred by their misconduct, then *a fortiori* plaintiffs who seek to vindicate federal statutes they have not violated cannot be turned away on supposed public policy grounds of punishing wrongdoers.

In sum, these two lines of decisions demonstrate that the proper approach to after-acquired misconduct evidence in discrimination cases is one that forthrightly seeks to accommodate the competing policy concerns. Where the policies expressed in a federal statute run up against countervailing public policies, the courts should fashion a remedy that "protects against the invasion of [federal] rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. The lower courts' theory of causation/legal injury frustrates this goal by forcing a choice between a complete remedy or no remedy at all. Faced with this artificial choice, it is small wonder that most courts have opted to leave the plaintiff empty-handed.

III. After-Acquired Evidence May Affect The Remedies Available In Particular Cases

We have shown that denying all relief to victims of unlawful discrimination on the basis of after-acquired evidence is inconsistent with the language and purposes of the fair employment laws. In this part we discuss the proper effect of after-acquired evidence on the four types of relief requested by petitioner in her complaint: (1) backpay for the wages and benefits she lost as a result of her wrongful dismissal and discriminatory denial of raises while she was employed; (2) reinstatement and front pay; (3) compensatory damages for the humiliation and embarrassment she suffered

as a result of age harassment, and (4) liquidated or punitive damages. We show that, although after-acquired evidence should never affect the availability of liquidated damages, in particular cases it may serve to terminate backpay and certain compensatory damages sooner than would otherwise be required and to preclude reinstatement and front pay entirely. Permitting after-acquired evidence to play a role in the formulation of a remedy is consistent with the statutory goal of placing discrimination victims, as near as may be, in the position they would have occupied had the discrimination not occurred. *United States v. Burke*, 112 S.Ct. 1867, 1873 (1992) (Title VII); *Albemarle Paper*, 422 U.S. at 418; *Hawley v. Dresser Indus., Inc.*, 958 F.2d 720, 725 (6th Cir. 1992) (ADEA); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1398 (3d Cir. 1984) (same). Such evidence may demonstrate that an unlawfully discharged worker who files a discrimination action would have been discharged lawfully prior to the date of final judgment in that action even in the absence of discrimination. Under these circumstances, reinstating the plaintiff and awarding full backpay would disserve the purposes of the fair employment laws by making the plaintiff better off than if no discrimination had occurred. See *Wallace*, 968 F.2d at 1182; cf. 42 U.S.C. § 2000e-(2)(j).

Allowing the use of after-acquired evidence to limit relief creates an obvious incentive for defendants to claim that any previously undisclosed resume falsification or workplace-rule infraction would have resulted in the plaintiff's dismissal had it been known. To guard against the possibility of abuse, a defendant should be required to prove its claim by objective evidence, such as a preexisting written policy stating that the conduct in question will result in immediate dismissal. See *Welch v. Liberty Machine Works*, 1994 U.S. App. LEXIS 10028, at *8, 23 F.3d 1403 (8th Cir. Jan. 13, 1994) (reversing summary judgment for employer because "self-serving affidavit" did not meet the "substantial

burden of establishing that the policy predated the hiring and firing of the employee"); cf. EEOC Revised Enforcement Guide, *supra*, at 405:6925 (employer must offer "objective evidence" of a "legitimate reason for the action" in mixed motive cases).

In addition, the defendant should be required to prove that its policy mandating dismissal is actually applied on a nondiscriminatory basis to others who engage in the same or similar conduct. See *Franks*, 424 U.S. at 772-73 & n.32;¹⁶ *McDonnell Douglas v. Green*, 411 U.S. 792, 804 (1973) (evidence that employer had retained other employees who engaged in same conduct is "especially relevant" to showing pretextual nature of employer's stated reason for discharge). Finally, the court should bear in mind that proof that an employee would not have been hired is not proof that the employee would have been fired, for "[t]here are many situations * * * in which an employer would not discharge an employee if it subsequently discovered resume fraud, although the employee would not have been hired absent that resume fraud." *Bonger v. American Water Works*, 789 F. Supp. 1102, 1106 (D. Colo. 1992). Accord *Washington v. Lake County, Ill.*, 969 F.2d at 254.

With the foregoing in mind, we turn now to the different forms of relief requested by petitioner.

¹⁶ In *Franks* the Court held that an employer could avoid providing make-whole relief to applicants who were discriminatorily denied consideration for line driver positions by showing that the individuals in question would not have been hired on the basis of "nondiscriminatory standards actually applied by Bowman to individuals who were in fact hired." 424 U.S. at 733 n.32 (emphasis added).

A. Backpay. A worker who has been discharged discriminatorily is normally entitled to backpay from the date of discharge to the date of final judgment. See *Lorillard v. Pons*, 434 U.S. at 584; *Franks*, 424 U.S. at 786 (Powell, J., concurring and dissenting); *Anastasio v. Schering Corp.*, 838 F.2d 701, 708 (3d Cir. 1988). However, "[c]onsistent with the ADEA's purpose of recreating the circumstances that would have existed but for the illegal discrimination, aggrieved persons are not entitled to recover damages for the period beyond which they would have been terminated for a nondiscriminatory reason." *Gibson*, 695 F.2d at 1097. *Accord Stacey v. Allied Stores Corp.*, 768 F.2d 402, 408 (D.C. Cir. 1985); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir. 1983). Thus, for example, an employee is not entitled to backpay beyond the period when his or her job would have been eliminated because of plant closure, see *Gibson*, 695 F.2d at 1097, or a company reorganization, see *Bartek v. Urban Redevelop. Auth.*, 882 F.2d 739, 747 (3d Cir. 1989).

It follows that the victim of a discriminatory dismissal should not receive full backpay if the employer can prove that, even absent the discrimination, it would have discovered a legitimate reason for dismissal prior to the date of final judgment and would have dismissed the plaintiff on that basis alone. Back pay should be awarded, however, up until the point the legitimate reason would have been discovered. Since the employee would have remained employed up to that time but for the discrimination, a denial of back pay covering this period of time would leave the plaintiff worse off than if discrimination had not occurred. See *Wallace*, 968 F.2d at 1182.

Although an employer may well find it difficult to prove when evidence of employee misconduct would have been discovered absent the plaintiff's suit, employers seeking to limit backpay liability are often called upon to prove what would have happened to a worker had the employer not

discriminated. See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. at 324, 359, 362 (1977); *Gibson*, 695 F.2d at 1009. Where the employee's misconduct was particularly egregious or detrimental to the employer, a court may conclude that it would have been discovered in short order. Regardless of the difficulty of proof, however, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).¹⁷ And the nature of an employee's misconduct, even if particularly egregious, does not justify a departure from the make-whole principle of relief. As this Court has previously observed, even workers who have committed "a serious criminal offense against their employer" are entitled to the full protection of the fair employment laws. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 281 (1976). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04 (1973).¹⁸

B. Reinstatement and Front Pay. Normally an order of reinstatement is required to make the prevailing plaintiff whole. See *Franks*, 424 U.S. at 779; *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138 (8th Cir. 1981); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991). Unlike

¹⁷ For these reasons we disagree with the EEOC's position that backpay should terminate on the date the misconduct was actually discovered, for that position may leave a worker worse off as a result of discrimination.

¹⁸ The Tenth Circuit in *Summers* hypothesized the situation in which, during the course of fair employment litigation, one purporting to be a doctor is unmasked as a fake. To our knowledge no case has presented such an extreme situation, but should such an unlikely case ever arise a court of equity may deal with it appropriately without violating the deterrent and make-whole purposes of the fair employment laws. Cf. *Albemarle Paper*, 422 U.S. at 424 (in particular cases which have been litigated in an unusual manner, backpay can be denied without implicating the purposes of backpay relief).

backpay, however, which "squares accounts of what may be a closed relationship," "[o]rders for reinstatement and hiring are of on-going consequence to both employee and employer and [thus] involve more than making a victim of discrimination whole for past injuries." *Rodriguez*, 569 F.2d at 1242 n.21. Accordingly, most courts have recognized that "notwithstanding the desirability of reinstatement, intervening historical circumstances can make it impossible or inappropriate." *Duke v. Uniroyal Inc.*, 928 F.2d at 1423. See also, e.g., *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (8th Cir. 1980) (denying reinstatement because plaintiff was no longer physically fit for the position); *Ginsberg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 699 (S.D.N.Y. 1980) (appropriate to deny reinstatement where facts demonstrate a "lack of complete trust and confidence between plaintiff and defendant").

The discovery of after-acquired evidence is an "intervening historical circumstance" that may make reinstatement inappropriate. First, if the employer proves that, even absent the discriminatory dismissal and ensuing litigation, it would have discovered the after-acquired evidence in short order and dismissed the plaintiff, reinstatement would in effect make the plaintiff better off than if no discrimination had occurred. Second, even without such proof, the discovery itself may nevertheless so damage the employment relationship that reinstatement would be unworkable. *McKnight v. General Motors Corp.*, 908 F.2d 101, 115 (7th Cir. 1990). In the latter case, however, an award of front pay might be appropriate to compensate for the lack of reinstatement. See *Duke v. Uniroyal Inc.*, 928 F.2d at 1423; *Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir. 1991); *Floca v. Homcare Health Servs., Inc.*, 845 F.2d 108, 112 (5th Cir. 1988); cf. *Burke*, 112 S. Ct. at 1873 & n.9.

C. Compensatory Damages. Under the Civil Rights Act of 1991, prevailing plaintiffs in disparate treatment cases are entitled to compensatory damages for pain and suffering caused by employment discrimination. 42 U.S.C. § 1981a. This Court has never determined whether such damages are available under the ADEA, a question on which *Franklin v. Gwinnett County Public Schools*, 503 U.S. ___, 112 S. Ct. 1028 (1992), may bear heavily. But the Court need not decide that issue to hold that after-acquired evidence should have no effect on the availability of compensatory damages where, as here, they are sought as a remedy for age-based harassment. The harms inflicted by discriminatory harassment are well-documented in the prior decisions of this Court. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, ___ U.S. ___, 114 S. Ct. 367 (1993). These harms are not diminished simply because an employer can show that it would have fired (or would not have hired) the victim had it known something of which it was unaware. Cf. *Still, supra*. Where, however, compensatory damages are sought to offset harm resulting from unemployment, then, like backpay, they should not be awarded beyond the point at which the plaintiff would have been dismissed for legitimate reasons. See EEOC Revised Enforcement Guide, *supra*, at 405:6926 (after-acquired evidence may cut off compensatory damages covering losses arising after discovery of misconduct).

D. Liquidated Damages. Punitive damages are available under Title VII as amended by the Civil Rights Act of 1991 if the employer acts "with malice or with reckless indifference" to the employee's rights, 42 U.S.C. § 1981a, and under the ADEA in the form of liquidated or double damages if the employer's violation was "willful," 29 U.S.C. § 626(b). See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (Congress intended ADEA's liquidated damages to be punitive in nature). A violation is "willful" if the employer "knew or showed reckless disregard for the

matter of whether its conduct was prohibited by the ADEA." Id. at 128 (citation omitted).

After-acquired evidence should have no effect on the availability of liquidated or punitive damages under the fair employment laws. See EEOC Revised Enforcement Guide, supra, at 405:6927. Those remedies are awarded depending on the employer's understanding of the lawfulness of its own conduct; information the employer did not acquire until after it acted can have no bearing on that issue. Moreover, because punitive damages are meant to deter rather than compensate, the employer's conduct, not the employee's, is the only relevant consideration.

CONCLUSION

The judgment of the court of appeals should be reversed.

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OCTOBER TERM, 1994

CHRISTINE MCKENNON,
v. *Petitioner,*

NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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35 PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. AN EMPLOYER WHO COMMITS VIOLATIONS OF THE ADEA IS NOT IMMUNIZED FROM LIABILITY BY REASON OF THE PLAINTIFF'S BREACH OF AN EMPLOYMENT RULE THAT WAS NOT KNOWN TO THE EMPLOYER AT THE TIME OF THE ADEA VIOLATIONS	4
II. ONLY IN NARROW CIRCUMSTANCES SHOULD THE FACT THAT AN EMPLOYMENT DISCRIMINATION PLAINTIFF BREACHED AN EMPLOYMENT RULE THAT WAS NOT THE BASIS FOR HER UNLAWFUL DISCHARGE LIMIT THE RELIEF AVAILABLE FOR THE STATUTORY VIOLATION	16
1. Economic Damages	17
2. Proof of Economic Damages	24
3. Reinstatement	28
CONCLUSION	30

TABLE OF AUTHORITIES

FEDERAL CASES	Page
<i>ABF Freight System Inc. v. NLRB</i> , 114 S. Ct. 835 (1994)	8
<i>A.C. Frost & Co. v. Couer D'Alene Mines Corp.</i> , 312 U.S. 38 (1941)	12
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	passim
<i>Anderson v. Liberty Lobby</i> , 477 U.S. 242 (1986) ..	27
<i>Anderson v. Mt. Clemens Pottery Co.</i> , 328 U.S. 680 (1946)	26
<i>Bigelow v. RKO Radio Pictures</i> , 327 U.S. 251 (1946)	26
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989)	6
<i>Eastman Kodak Co. v. Southern Photo Material Co.</i> , 273 U.S. 359 (1927)	17
<i>Eastman Kodak v. Image Technical Services, Inc.</i> , 112 S. Ct. 2072 (1992)	2
<i>Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.</i> , 298 F.2d 356 (6th Cir. 1961)	26
<i>Evanston Bank v. Brink's Inc.</i> , 853 F.2d 512 (7th Cir. 1988)	26
<i>Francis v. AT&T</i> , 55 F.R.D. 202 (D.D.C. 1972)	21
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	10
<i>Hazen Paper Co. v. Biggins</i> , 113 S. Ct. 1701 (1993)	16
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	4, 5
<i>McDonald v. Santa Fe Trail Transportation Co.</i> , 427 U.S. 273 (1976)	passim
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	passim
<i>Mitchell Bros. Film Group v. Cinema Adult Theater</i> , 604 F.2d 852 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980)	12
<i>Mt. Healthy City School Dist. v. Doyle</i> , 429 U.S. 274 (1977)	13, 15
<i>NLRB v. Transportation Management</i> , 462 U.S. 393 (1983)	8
<i>Nationwide Mutual Ins. Co. v. Darden</i> , 112 S. Ct. 1344 (1992)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>Northeastern Florida Contractors v. Jacksonville</i> , 113 S. Ct. 2297 (1993)	13
<i>Owens Illinois</i> , 290 NLRB 1193 (1988), enforced without opinion, 872 F.2d 413 (3rd Cir. 1989) ..	29
<i>Palmer v. Connecticut Ry. & Lighting Co.</i> , 311 U.S. 544 (1941)	25
<i>Perma-Life Mufflers, Inc. v. International Parts Corp.</i> , 392 U.S. 134 (1968)	12
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	passim
<i>Proulx v. Citibank, N.A.</i> , 681 F. Supp. 199 (S.D. N.Y.), aff'd mem., 862 F.2d 301 (2d Cir. 1988) ..	25
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	13, 15
<i>Reves v. Ernst & Young</i> , 113 S. Ct. 1163 (1993) ..	4
<i>Roberts v. Sears, Roebuck & Co.</i> , 531 F. Supp. 784 (N.D. Ill. 1982)	27
<i>Sartor v. Arkansas Natural Gas Co.</i> , 321 U.S. 620 (1944)	27
<i>Summers v. State Farm Mutual Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	29
<i>Story Parchment Co. v. Patterson Parchment Paper Co.</i> , 282 U.S. 555 (1931)	17, 24, 25
<i>Teachers v. Hudson</i> , 475 U.S. 292 (1986)	29
<i>Trans World Airlines v. Thurston</i> , 469 U.S. 111 (1985)	5
<i>United Paperworkers Int'l Union v. Misco, Inc.</i> , 484 U.S. 29 (1987)	29
<i>United States v. Alvarez-Sanchez</i> , 114 S. Ct. 1599 (1994)	4
<i>Virginia Elec. & P. Co. v. Labor Board</i> , 319 U.S. 533 (1943)	12
STATE CASES	
<i>Nager v. Nager</i> , 339 S.W.2d 492 (Mo. Ct. App. 1960)	25
<i>Noble v. Tweedy</i> , 203 P.2d 778 (Cal. Ct. App. 1949)	25
FEDERAL STATUTES AND RULES	
29 U.S.C. § 158(d)	10

TABLE OF AUTHORITIES—Continued

	Page
Fair Labor Standards Act, 29 U.S.C. § 201 <i>et seq.</i> ...	5
Age Discrimination in Employment Act ("ADEA")	
29 U.S.C. § 621	<i>passim</i>
29 U.S.C. § 623 (a) (1)	5
29 U.S.C. § 626 (b), (c), & (d)	5, 16
29 U.S.C. § 630 (b) and (f)	5, 6
42 U.S.C. § 1981a	14
42 U.S.C. § 1981a (b)	5
42 U.S.C. § 2000e-2 (m) and 2000e (5) (g) (2) (B) ..	14
42 U.S.C. § 2000e-5	5
42 U.S.C. § 2000e-5 (g)	8
Fed. R. Evid. 403	21
Fed. R. Evid. 602	26
Fed. R. Evid. 701	26
Rev. Rul. 87-41, 1987-1 Cum. Bull. 296	6
MISCELLANEOUS	
Am. Jur. 2d, <i>Damages</i> § 489 (1988)	24
Joseph H. Beale, <i>The Proximate Consequences of an Act</i> , 33 Harv. L. Rev. 632 (1920)	9
Frank Elkouri & Edna Elkouri, <i>How Arbitration Works</i> (4th ed. 1985)	23
Graham, <i>Handbook of Federal Evidence</i> (1986)	26
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Stone, <i>The American Management Association Handbook of Supervisory Management</i>	23
Charles A. Wright & Victor J. Gold, <i>Federal Practice & Procedure Evidence</i> (1988)	26

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1543

CHRISTINE MCKENNON,
 Petitioner,
 v.
 NASHVILLE BANNER PUBLISHING CO.,
 Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Sixth Circuit

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
 AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
 AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 84 national and international unions with a total membership of approximately 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ms. McKennon, the plaintiff in this case, has alleged in her complaint that, due to her age, she was disadvantaged in pay, was harassed, and, ultimately, was discharged. Since the employer was granted summary judgment, and the plaintiff denied all relief, for the present purposes the posture of the case is one in which it must be taken as true that all of these wrongs, violative of the

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, occurred. *Eastman Kodak v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2077 (1992).

Before she was fired (but after some of the wage discrimination and harassment occurred), Ms. McKennon took home copies of certain confidential documents, a violation of her employment responsibilities that came to light only as a result of the discovery in this case. The employer maintains, based *solely* on declarations by employer officials, that had the confidentiality breach been discovered when it occurred, Ms. McKennon would have been discharged at that time rather than at the later time she was, in fact, discharged.¹ On that basis alone, the employer was absolved of all responsibility for all its alleged unlawful actions.

I. It is, we submit, all but self-evident that the Court of Appeals erred in absolving completely an employer who has committed several different acts in direct violation of Congress' proscription against visiting disadvantages upon employees because of their age. On any construction of the facts, it is apparent *both* that the employer violated the norms established by the statute *and* that the violation was the cause, as a matter of actual fact, of Ms. McKennon's discharge. Whatever the validity of the conclusion that Ms. McKennon would have been discharged earlier had her employer known of her confidentiality breach, the *actuality* is that her employer did *not* know, and that she *was* harassed, *was* disadvan-

¹ While the employer purported to "fire" Ms. McKennon a second time, after the evidence of her infraction came to light, that second, *post hoc* firing was not the basis for Court of Appeals ruling. Had it been, the Court of Appeals then would have simply limited relief to the period before the second firing, which is not what it did.

We note that while the record reflects that Ms. McKennon recognized that her actions were ones for which she could have been discharged, she did *not* concede that she in fact would have been discharged, quite a different issue. See p. 15, *infra*.

tagged in pay, and *was* discharged *because of her age*. The ADEA was therefore in terms violated.

Moreover, Ms. McKennon was injured as a result of that violation—that is, the employer's illegal actions caused Ms. McKennon financial (and possibly other) harm. And, this Court has made clear that even imperfect employees who commit serious employment-related misdeeds are entitled to the protection of the employment discrimination laws. Thus, both the larger public policy goals of the ADEA and the statute's compensatory, "make whole" purpose are served by holding the employer liable for its wrongs and by requiring the employer to provide at least some recompense to Ms. McKennon for the ADEA violations the employer did commit.

II. The more interesting, and difficult, questions raised by cases such as this are two: First, what are the precise *remedial* consequences, if any, of the fact that the plaintiff employee did something at any point, known or unknown to the employer, that could have legitimately justified the adverse employment action in fact taken by the employer against the employee for a proscribed reason? Second, assuming that in some such circumstances relief is properly limited on such a ground, what standards of proof apply and what types of evidence suffice?

As to the first question, tort analogies, principles governing determination of damages, and considerations of statutory policies all lead to the conclusion that the possibility of a hypothetical discharge (or failure to hire or other adverse employment action) distinct from the one that actually occurred should be allowed to affect only backpay relief under the ADEA, and only when there is evidence sufficiently strong to make the likelihood of the hypothetical employer action all but certain. In most circumstances, that evidence would have to establish *both* that the employee infraction would have come to light absent the discriminatory action and the ensuing lawsuit (and when), and that the employer would have discharged the employee when the information came to light.

As to the second question, the testimony of an employer witness as to what would have happened in hypothetical circumstances that did not in fact occur is ordinarily inadmissible under the Federal Rules of Evidence, as non-expert opinion or speculation not within the witness' personal knowledge and should not, for similar reasons, be sufficient to meet the employer's standard of proof even if admitted.

Finally, the reinstatement remedy should be subject to somewhat different considerations from the backpay remedy. There may be very narrow circumstances in which employees should not be reinstated even if the back pay remedy is appropriate. Conversely, since reinstatement is an equitable remedy, and since wrongdoers are not necessarily entitled to the free exercise of the same prerogatives as non-wrongdoers, there may be situations in which an employer would in fact not have kept the individual on, but in which the person should still be reinstated in the interest of eliminating discrimination in the workplace.

ARGUMENT

I. AN EMPLOYER WHO COMMITS VIOLATIONS OF THE ADEA IS NOT IMMUNIZED FROM LIABILITY BY REASON OF THE PLAINTIFF'S BREACH OF AN EMPLOYMENT RULE THAT WAS NOT KNOWN TO THE EMPLOYER AT THE TIME OF THE ADEA VIOLATIONS.

1. As always, the starting place for determining how a statute applies to the situation before the Court is the statutory language itself. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169 (1993); *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1603 (1994).²

² The substantive provisions of the Age Discrimination in Employment Act "were derived *in haec verba* from Title VII [of the 1964 Civil Rights Act]." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Generally, judicial interpretations of the substantive provisions of Title VII "appl[y] with equal force in the context of

The ADEA defines an "employee" as "an individual employed by any employer. . . .", and an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630 (b) and (f). And the statute, as here pertinent, proscribes "an employer" from

"discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." [29 U.S.C. § 623 (a)(1).]

This language, in our view, compels the conclusion that Ms. McKennon's age discrimination lawsuits is *not* subject to dismissal pursuant to summary judgment for the defendant. The Nashville Banner has not contended that

age discrimination." *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

The procedural provisions of the ADEA are, however, "something of a hybrid" (*Lorillard*, 434 U.S. at 578), drawing in part upon the procedural scheme of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, but also emulating portions of the remedial scheme of Title VII. See 29 U.S.C. § 626(b), (c), & (d); compare 42 U.S.C. § 2000e-5. In particular, with regard to the relief provided by the ADEA, "legal or equitable relief as may be appropriate to effectuate the purposes of this subchapter" is generally available (29 U.S.C. § 626(b), (c)), while under Title VII, equitable relief and, under the 1991 amendments, limited compensatory and punitive damages, are available (compare 42 U.S.C. § 2000e-5(g), 42 U.S.C. 1981a(b)). And, the availability of back pay relief under the ADEA is a matter of right, while under Title VII back pay is a matter of equitable discretion. *Lorillard*, 434 U.S. at 584, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

For present purposes, the upshot is that substantive Title VII cases are generally pertinent in interpreting the ADEA (and are freely cited for that purpose in this Brief). Title VII cases concerning the availability of injunctive forms of equitable relief are generally applicable as well. This free interchange does not extend to the ADEA provisions concerning the availability of monetary relief, including back pay, which differ from those of Title VII.

it is not an "employer" under the ADEA. Ms. McKennon has contended that she was at the relevant time an "employee" of the Banner within the ordinary meaning of the term, in the sense that she performed economically-useful work for the newspaper and was paid for so doing.³ In any event, the pertinent statutory provision does not protect only "employees" but "individuals" from discharge and other adverse employment actions based upon age.⁴

Moreover, here, in contrast to the situation in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), there is no doubt that, on the facts as alleged and, for present purposes, not disputed, the substantive prohibition of

³ See, e.g., Webster's New Ninth Collegiate Dictionary (1991) at 408 (defining "employ" as "to provide with a job that pays wages or salary" and "employee" as "one employed by another—usually for wages or salary and in a position below the executive level").

Plainly, it is a functional definition of this sort, not a normative one, that is generally used in federal statutes. Absent some indication to the contrary, the term "employee" in those statutes ordinarily is interpreted as incorporating the common law standard, emphasizing "the hiring party's right to control the manner and means by which the product is accomplished." *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992), quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). The IRS, for example, in determining whether or not an employer is required to pay Social Security taxes on an employee, considers a series of factors concerning that person's actual relationship to the employer. See Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-99. It does not consider whether or not the employer had some basis, known or unknown, for altering that relationship which was not in fact exercised before the time period within which paid work was performed and taxes therefore are due. In short, the question whether or not a person is an employee is not for legal purposes generally confused with the question whether that person is properly an employee.

⁴ Similarly, the statute's remedial provisions permit "[a]ny person aggrieved" to bring a civil action, and provide for payment as unpaid wages of "[a]mounts owing to a person as result of a violation of this chapter." 29 U.S.C. § 626(b) and (c)(1) (emphases supplied). The retaliatory discharge provision, 29 U.S.C. § 623(d), however, does limit its protections to "employees or applicants for employment."

the statute *applies in terms*. The pertinent question in *Price Waterhouse* was whether or not an adverse employment decision can be said to occur "because of" the individual's gender, where the employer's adverse employment decision took into account both permissible and impermissible factors and might have been the same absent the impermissible factor. The plurality, concurring, and dissenting opinions answered that question through varying theoretical constructs. But all these opinions ultimately concluded that a given employer action does not occur "because of" a proscribed motive where the *same* action would have occurred at the *same* time because of other, actually-existing motives. *Id.* at 258 (plurality opinion); 261 (White, J., concurring); 279 (O'Connor, J., concurring); 295 (Kennedy, J., dissenting).⁵

Here, however, there is no question that the actions complained of, according to the complaint, occurred "because of" Ms. McKennon's age, *both* in the sense that age "was a factor in the employment decision *at the moment it was made*" (*id.* at 240 (plurality opinion)), and in the "but-for causation" sense (*id.*, at 262 (O'Connor, J., concurring in the judgment)) that Ms. McKennon's age in fact did "make a difference to the outcome" so that "[t]he event would [not] have occurred *just the same* without it." (*id.* at 282 (Kennedy, J. dissenting) (emphasis supplied)). See also *id.* at 279 (emphasis supplied) (question is whether "the outcome would have been the *same* if respondent's professional merit had been [the employer's] only concern.")

At a minimum, absent the employer's age discrimination, Ms. McKennon would not have suffered the wage discrimination and harassment she alleges she endured while employed, and would have been discharged, if at

⁵ The principal difference between the majority and dissenting opinions in *Price Waterhouse* was not on that question, but on whether or not the burden of proof as to what would have happened absent the impermissible consideration is properly on the plaintiff or on the defendant.

all, not when she was but some time later, when her infraction was discovered, losing less pay and benefits than she in fact lost. Thus, while Ms. McKennon might eventually have been terminated at some point had she not been discriminated against on the basis of her age, overall "the outcome would [not] have been the same." *Id.* at 279 (Kennedy, J., dissenting) (emphasis supplied).

Indeed, where the employer only acquires information concerning an alleged employee infraction *after* the employer takes an unlawful, adverse action against that employee—so that the employer could *not* have taken that action based upon that information at that time—the infraction could *not* have been a contributing factor ("motivating", "substantial", "but for" or otherwise) with regard to the *actual* employer action.⁶ To take an analogous example, in a wrongful death action brought against the allegedly negligent driver of the automobile that hit and instantaneously killed the plaintiff, evidence that the autopsy determined that the plaintiff had been terminally ill (although not in any way affecting her ability to survive the impact) at the time of the accident, and therefore would have died a short while later, is *not*

⁶ There is in the ADEA no provision parallel to the subsection of Title VII forbidding reinstatement and backpay where "such individual was . . . discharged for any reason other than discrimination on account of race [etc.] . . ." Title VII § 706(g), 42 U.S.C. § 2000e-5(g). Even under Title VII, the provision just quoted would plainly have no application here, since plaintiff was not discharged for a "reason other than discrimination on account of [age]"; she was (or we must assume that she was) discharged precisely for age. See also *Price Waterhouse*, 490 U.S. at 244 n.10 (§ 706(g), modelled upon § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), concerns relief, not liability, and applies not to individual discrimination cases but to pattern-and-practice and class action cases); *NLRB v. Transportation Management*, 462 U.S. 393, 401 n.6 (1983) (construing § 10(c) of the NLRA so as not to apply where there was in fact a discriminatory motive); *ABF Freight System Inc. v. NLRB*, 114 S. Ct. 835, 839 (1994) (the NLRA's specific, limited prohibition upon reinstatement and backpay in certain circumstances indicates that there is no such prohibition in other circumstances).

relevant to the issue of whether the driver has caused the death or committed a tort. Drivers do not have a privilege to negligently run down terminally ill pedestrians any more than drivers have a right to negligently run down apparently healthy pedestrians. The illness pertinence, at the most, is in measuring the monetary damages payable on account of the plaintiff's death. See William L. Prosser, *Handbook of the Law of Torts* § 52 at p. 321 (4th ed. 1971).⁷

2. Despite the plain applicability of the state's prohibitory language, as construed by this Court, and the absence of any pertinent exceptions to that operative statutory language, the employer maintains that there is some implicit basis, not apparent upon the face of the statute, upon which Ms. McKennon's suit should be dismissed and all relief for the ADEA wrongs committed denied out of hand.

(a) The first suggestion as to why this result obtains is best characterized as the contention that, because at the time of the adverse employment actions against her (or at least some of them) Ms. McKennon had committed an employment infraction that might have justified her discharge, Ms. McKennon has forfeited any and all ADEA rights she might otherwise have as an "employee"

⁷ It is important to distinguish between the concepts of causation and valuation. See Joseph H. King, Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1353-58 (1981) (hereinafter "Causation, Valuation and Chance") (explaining the difference). In determining the cause of an injury, events that might have occurred but did not are irrelevant, even if they would have caused the same injury and even though, in placing a monetary value on the injury, consideration of such events may be proper. "[I]n determining causation, the question is not what would have happened but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death." Joseph H. Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 632, 638 (1920); see also Prosser, *Handbook of the Law of Torts*, at p. 237 ("Causation is a fact. It is a measure of what in fact happened.").

or "individual." The protections of the employment discrimination laws, however, are *not* limited to employees who have never violated the employer's or society's rules.

It is perhaps sufficient that the ADEA's language provides no such limitation.⁸ The employment discrimination statutes are directed at eradicating reliance on certain proscribed criteria in the employer's decisionmaking process concerning employees, thereby creating "equality of employment opportunity." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971) (emphasis supplied). As "prophylactic" statutes (*Albemarle Paper Co.*, 422 U.S. at 417 (1975)) whose purpose is to "drive employers to focus on qualifications rather than on [age or other proscribed factors]" (*Price Waterhouse*, 490 U.S. at 243 (plurality opinion)), employment discrimination statutes do *not* permit employers to continue to act upon the proscribed criteria with regard to less-than-perfect employees whom the employer might have a basis for discharging for "cause."

The Court has made that much clear in two seminal decisions growing out of employment discrimination claims brought by employees who engaged in extremely serious employment-related misconduct, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

⁸ The National Labor Relations Act, for example, does in limited circumstances regard otherwise-covered employees as outside the statute's protections because of actions deemed to be fundamentally inconsistent with the statutory scheme. See 29 U.S.C. § 158(d) ("Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.") The ADEA contains no similar exclusion of an employee from the Act's protections based on the actions of those employees. See also n.6, *supra*.

McDonnell Douglas involved an applicant for employment who, along with others, "illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change," and was arrested and fined as a result. 411 U.S. at 794-95. The Court recognized that "[n]othing in Title VII compels an employer to absolve and rehire one who had engaged in such deliberate, unlawful activity against it." *Id.* at 803. Nonetheless, the plaintiff was not disqualified from pursuing his case further because he had committed a serious, indeed criminal, wrong, directly affecting the defendant employer. Rather, recognizing that the role of Title VII is broadly to eradicate race and other forms of prohibited employment discrimination, the Court held that an employer "may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, *but only if this criterion is applied alike to members of all races.*" *Id.* at 804 (emphasis supplied).

McDonald, in its turn, concerned two employees discharged for "theft of property entrusted to [their] employer for carriage." 427 U.S. at 284.⁹ Their contention was that an equally culpable employee was not discharged and "that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white." *Id.* at 282-83. This Court emphatically rejected the employer's argument that, because the employees had committed "a serious criminal offense" against their employer, "Title VII affords petitioners no protection in this case" (*id.* at 281):

We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based, as petitioners' complaint admitted, on participation in serious misconduct or crime directed against the employer. The Act prohibits *all* racial discrimination in employ-

⁹ The Court in *McDonald* assumed that the misappropriation "would amount to a felony under Texas law." 427 U.S. at 283 n.12.

ment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it hardly is one for racial discrimination. [*Id.* at 283.]

In this instance Ms. McKennon is not contending that there was age discrimination in the application of the employer's rules against disclosure of confidential information, but that there was age discrimination *before* any question of the application of those rules arose. With regard to the question whether Title VII and the ADEA protect sinners as well as saints from proscribed discrimination, however, the distinction is one that makes no difference: Since "the Act prohibits *all* [age] discrimination in employment, without exception for any group of particular employees", *McDonald*, 427 U.S. at 283, Ms. McKennon's later-discovered confidentiality infraction does not strip her of her ADEA rights.¹⁰

(b) The second suggestion proffered for nonsuiting the plaintiff in this case despite the adverse employment actions taken against her based on age is that Ms. McKennon suffered no injury due to the employer's illegal actions, and therefore is entitled to no relief. *See*

¹⁰ Some have suggested the equitable "clean hands" doctrine as a basis for denying relief to plaintiffs in the position of Ms. McKennon. That suggestion is doubly flawed. First, the "clean hands" doctrine, like other common law and equitable defenses, is not imported into statutory schemes where to do so would frustrate the purposes of the statute. *See, e.g., Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968); *Virginia Elec. & P. Co. v. Labor Board*, 319 U.S. 533 (1943); *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 40 & 43-44 n.2 (1941); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (9th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). *McDonnell Douglas* and *McDonald* necessarily reject any "clean hands" approach, and make clear that to deprive a plaintiff of statutory rights under employment discrimination statutes because of their own workplace misconduct would fundamentally undermine the statutory scheme. Second, since backpay under the ADEA is *not* an equitable remedy (*see* n.2, *supra*), the "clean hands" doctrine would not in any event apply here on the backpay issue.

Pet. App. 5a. The notion is that if Ms. McKennon would have been fired for legitimate reasons, had the employer known of those reasons, before she was actually fired for age-related reasons, she suffered no injury due to the latter. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86 (1977) ("an employee [should not be] place[d] in a better position as a result of [age] than he would have occupied [otherwise]"); *Price Waterhouse*, 490 U.S. at 249 (plurality opinion). That theory does not fit the present circumstances, for two reasons.

First, as this Court has recently held, there is an "injury in fact" simply from being subjected to a discriminatory policy, even if the plaintiff cannot prove that he or she would have fared better under a nondiscriminatory policy. *Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993) (contractors suffer a cognizable injury and therefore have standing to challenge minority preference program for city contracts without alleging or proving that absent the program, the plaintiff contractors would have been awarded any contracts); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (applicant challenging minority admissions preference suffered an injury in being unable "to compete for all 100 places in the class, simply because of his race" and "[t]he question of [the applicant's] admission . . . is simply one of relief.")¹¹ *See also Price Waterhouse*,

¹¹ Justice Powell's controlling *Bakke* opinion went on to specifically reject the notion that the *Mt. Healthy* concern with avoiding windfalls to plaintiffs applies where it is clear that the discriminatory motive *was in fact the sole cause* of a plaintiff's injury:

There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate. . . In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of [the plaintiff's] protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely

490 U.S. at 265 (O'Connor, J., concurring) ("Congress considered reliance on gender or race in making employment decisions an evil in itself . . . Congress was not blind to the stigmatic harm which comes from being evaluated by reason of one's race or sex.")¹²

Indeed, the "primary" purpose of employment discrimination statutes is to "cause[] employers and unions to self-examine and self-evaluate their employment practices" (*Albemarle Paper Co.*, 422 U.S. at 418) so as to eliminate discriminatory behavior. It is therefore particularly plain that employers should *not* be absolved where the action taken was "because of" a statutorily proscribed criterion *and* the plaintiff suffered the precise sort of stigmatic harm the statute was designed to eliminate.¹³

on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result . . . In sum, a remand would result in fictitious recasting of past conduct. [438 U.S. at 320 n. 54 (opinion of Powell, J.) (citations omitted).]

¹² Unlike Title VII, which at the time *Price Waterhouse* was decided provided only for equitable relief, the ADEA provides for "such legal or equitable relief as will effectuate the purpose of the chapter." *But see* Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a (providing for limited compensatory and punitive damages for Title VII disparate treatment cases); 42 U.S.C. § 2000e-2(m) and 2000e(5)(g)(2)(B) (limiting relief available where (unlike here) "the respondent would have taken the same action in the absence of the impermissible aggravating factor"). It would therefore appear, although this Court has not had the opportunity to address the question, that damages for the "stigmatic harm" of being subject to age discrimination are available under the ADEA, regardless whether there was economic injury as well. Since, as developed in the text, there was economic injury in this case, there is no need to decide this issue here.

¹³ There may be limited circumstances in which it is both true that age discrimination was the dispositive cause in fact of an adverse employment action *and* the plaintiff is not thereby placed in a worse economic position than if the discrimination had not occurred. In particular, in hiring situations, it is possible that an individual could be excluded from the hiring pool solely on the basis of age, yet on the basis of his or her completed application and the em-

Second, even if one considers only the economic injury to the plaintiff, it is indubitably *not* true that Ms. McKennon, if denied all relief, would be "in no worse position than if [she had not been discriminated against on the basis of her age]." *Mt. Healthy School Dist.*, 429 U.S. at 285-86. As a result of age discrimination, Ms. McKennon, according to her complaint, lost wages, suffered emotional distress due to harassment, and was, at the very least, discharged before she would have been discharged for "cause." Indeed, it was only when she filed suit to redress her age discrimination injuries, that the information on her confidentiality breach came to light in the course of, and *as a result of*, the litigation itself. For all that appears, that information might never otherwise have been discovered, and it is only on the basis of that information that Ms. McKennon was "fired" for a second time and then nonsuited on her present ADEA claims.¹⁴

ployer's regular practices for screening applicants it is perfectly clear that the individual would have been excluded in the next "cut" anyway, for example, for lacking the requisite pilot's license or a universal-required college degree. Because in the hiring situation the person is *not* employed while the consideration process goes on, there is no economic injury where the rejection would have occurred before final decisions were made, even if the rejection actually occurred earlier than it would have otherwise.

The situation just hypothesized is similar to the one addressed in *Bakke*, and is different from the situation addressed in *Price Waterhouse*. In *Price Waterhouse*, the contention was that the *same actual decision* would have been made, at the *same time*, without regard to any discriminatory motive. Where that is the contention, the "cause" and "injury" issues collapse onto each other, so that the conclusion that there was no economic injury also demonstrates that illegitimate factors did not in fact cause the discharge. In contrast, in the above hiring example, there is no question that the cause of the events that actually occurred was unlawful discrimination, and the question is whether there is a cause of action without proof of a consequent economic injury.

¹⁴ Without in any way condoning Ms. McKennon's actions in taking home confidential documents, we believe it is highly relevant that because she did not use the documents she took home to divulge information injurious to the Banner, it is unlikely that her actions

Thus, the theory of the decision below undermines the "prophylactic" values inherent in ADEA, frustrates the "make . . . whole for injuries suffered on account of unlawful employment discrimination," (*Albemarle Paper Co.*, 422 U.S. at 418) value in the statute and compromises the very effort to vindicate those values through the legal process. That theory is plainly not a fair and proper interpretation and elaboration of the ADEA.

II. ONLY IN NARROW CIRCUMSTANCES SHOULD THE FACT THAT AN EMPLOYMENT DISCRIMINATION PLAINTIFF BREACHED AN EMPLOYMENT RULE THAT WAS NOT THE BASIS FOR HER UNLAWFUL DISCHARGE LIMIT THE RELIEF AVAILABLE FOR THE STATUTORY VIOLATION.

The question, then, becomes what relief ADEA plaintiffs in situations like this one are entitled to receive on proving that the defendant employer did commit the ADEA violations alleged.¹⁵

would have been discovered absent the employer's discriminatory actions against her and the ensuing lawsuit. In contrast, employee wrongdoing that does injure the employer, such as the theft in *McDonald* is likely to come to light whether or not the employee make a claim against the employer eventually.

¹⁵ With regard to damages for unequal pay because of age *while employed*, and for harassment because of age *while employed* there appears to be *no* basis for limiting the relief otherwise available under the ADEA. The lower pay and harassment, if both occurred as alleged, inflicted injuries while the plaintiff was still employed, and would not have been affected by any later hypothetical discharge based on legitimate, nondiscriminatory factors. Moreover, the values underlying the prohibitions upon age-related discriminatory pay and age-related harassment certainly would not permit the discrimination in question even if the employer *knew* of Ms. McKennon's breach of confidentiality while she was employed. An employer who discovered that breach would be entitled to discharge or otherwise discipline an employee for that reason, but not to pay her less because of her age and harass her because of her age.

As to liquidated damage under the ADEA, we would assume that the standards of "willfulness" under § 7(b) of the statute, 29 U.S.C. § 626(b), established by this Court would apply (*see Hazen Paper*

1. *Economic Damages*: It facilitates analysis to consider how similar problems are treated as a matter of the law of torts. *See Price Waterhouse*, 490 U.S. at 264 (characterizing Title VII as a "statutory employment 'tort'"). The general tort rule is that, once the plaintiff has satisfied her burden of proving that the defendant's wrongful conduct was the cause of some damage, the calculation of the amount, where uncertain, "may be left to reasonable inference," Charles T. McCormick, *Handbook of the Law of Damages* § 27, at p. 101 (1935), and "[t]he wrongdoer is not entitled to complain." *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Eastman Kodak Co. v. Southern Photo Material Co.*, 373 U.S. 359, 377-79 (1927); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

Assuming an omniscient trier of fact and a deterministic universe, deciding whether contingent events would have happened in the absence of the defendant's wrongful conduct in determining the plaintiff's damages makes perfect sense. However, in the real world of affairs the law has long had to cope with the fact that, regardless of what theory is accepted with regard to determinism, omniscience is not possible, and the contingent possibilities that might affect damages are infinite. In determining damages, therefore, courts have consistently excluded consideration of possible developments that are too remote, speculative,

Co. v. Biggins, 113 S. Ct. 1701, 1708 (1993)) as usual, and that the amount of liquidated damages would be, as usual, an amount equal to whatever backpay is awarded, as the statute unequivocally directs.

Although punitive damages are not available under the ADEA, as a general matter it would appear that since punitive damages are designed to deter certain conduct rather than to compensate the plaintiff, such damages should be available without regard to whether the economic damages are limited by the possibility of a late, hypothetical discharge.

Since there seem to be no difficult questions concerning the availability of relief of these kinds, we do not address these matters further in the textual discussion that follows.

and uncertain, and have done so most forcefully when it is the defendant, *an adjudicated wrongdoer*, who is seeking to rely on such possibilities to limit monetary relief.¹⁶

For example, there is considerable discussion by commentators concerning hypotheticals in which a person is shot while (1) standing in the path of an avalanche and (2) about to embark on a steamship doomed later to strike an iceberg and sink. Although the commentators differ in their reasoning, they agree that the fact of the avalanche, already in progress when the shooting occurred, should be considered in determining damages for wrongful death, while the planned embarkation on the steamship should not. See, e.g. Prosser, *Handbook of the Law of Torts*, *supra*, § 52, at pp. 321-323; King, Causation, Valuation and Chance, *supra*, 90 Yale L.J. at 1358; Robert L. Peaslee, Multiple Causation and Damage, 47 Harv. L. Rev. 1127, 1139-40 (1934). According to Prosser, for contingent factors properly to be considered in reducing the amount of damages, "they must be in operation when the defendant causes harm, and so imminent that reasonable men would take them into account." Prosser, *Handbook of the Law of Torts* at p. 321. The plaintiff with a steamship ticket might later decide not to make the voyage, might somehow spot the iceberg in time to avert an accident, or might miraculously be the sole survivor of the wreck. All that being possible, at some point the law must disregard contingent events in computing damages, because "[t]he retrospective conjuring up of events contingent at the time of injury would open

¹⁶ We recognize that *Price Waterhouse* did sanction the proof of facts concerning what would have happened absent a discriminatory motive as an affirmative employer defense, itself a somewhat speculative endeavor (albeit much less speculative than the hypothesis ventured here, since the pertinent discharge itself and the mixed motives therefore were real, not hypothetical). The plurality opinion in *Price Waterhouse*, however, specifically recognized that where the question is "the proper determination of relief rather than [as in *Price Waterhouse*] the initial finding of liability, different principles may govern." 490 U.S. at 254.

the door to absurd results" and "allowing such factors to affect valuation would create a rule that could not be administered." King, Causation, Valuation and Chance, 90 Yale L.J. at 1358.

2. There may be some employment discrimination cases that are similar to the "avalanche" hypothetical, in that a later, valid termination is already "in progress" at the time of the earlier, illegal termination, and should properly be taken into account in valuing economic damages. For example, where there are discrete layers of management with discharge and layoff authority, it is possible to imagine a situation in which an individual is illegally discharged on a Monday although, unbeknownst to her or to the supervisor firing her, headquarters has already determined to discharge her for a legitimate reason recently discovered, and has placed the pink slip in her envelope, awaiting delivery at the end of the week. While, even in this circumstance, termination on Friday is not certain—perhaps the employer will have a change of heart or of need, due to the employer's landing a major contract on Wednesday—the contingency is sufficiently certain that economic damages for the illegal discharge should be limited to backpay for the period between Monday and Friday.¹⁷

In terms of certainty, the present case is at the other end of the spectrum.

¹⁷ As we discuss later, the propriety of relying on such a contingent, although extremely likely, event to limit damages should properly depend in part upon the clarity of the showing that the contingent event was indeed in progress. In the hypothetical in the text, that showing can normally be made through evidence that a decision had been made to discharge the plaintiff and would have been carried out other than the testimony of headquarters personnel as to their subjective intent. For example, the pink slip should be available, and testimony as to when the envelopes were stuffed should be as well. If there were no documents or external events to confirm the "decision" to discharge the plaintiff imminently, the contingent nature of the event testified to, compounded by the speculative nature of the testimony, counsels against permitting any discount of damages on that testimony.

(a) First, the questions of whether the employee infraction would have been discovered by the employer, and if so when, involve many contingent circumstances.

(i) It might be supposed that these two questions can be answered in a nonspeculative manner by proof as to whether and when the information was in fact discovered. But where the information came to light in the course of litigation, that fact does not provide the answer to the *pertinent* question, which is what would have happened had the plaintiff employee's employment simply continued, without any unlawful discharge. See *Albemarle Paper Co.*, 422 U.S. at 418-19 ("The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed") (quoting *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L.Ed. 752 (1877)). Since, absent the earlier, illegal discharge there is no reason to believe there would have been any lawsuit at all, there is no logical basis for the proposition that the information obtained in the course of that lawsuit is information that the defendant employer would have obtained *absent the lawsuit*.

Permitting employers who are defendants in lawsuits brought to enforce anti-discrimination statutes to use information about employment matters, *dehors* the merits, that is brought to light through the litigation process to limit their damages for committing a statutory wrong would, moreover, undermine the efficacy of the overall statutory system designed to prevent the commission of such wrongs.

If an employer had a policy of investigating wrongdoing more vigorously for women than for men, for blacks than for whites, or for older workers than for younger workers, and discharging those found in such investigations to have committed wrongs presenting grounds for discharge, that practice in itself would be discrimination based on a proscribed criteria, and illegal. Cf. *McDonald, supra*. Similarly, an employer who automatically ran a background check on any employee who filed a complaint of age discrimination with the EEOC but not

on any other present employees and took action based on the information obtained could well be held to have "discriminate[d] against any individual . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge . . . under this chapter." 29 U.S.C. § 623(d). See *Francis v. AT&T*, 55 F.R.D. 202 (D.D.C. 1972). The effect of permitting employers to use information obtained as a result of a discrimination lawsuit to create a hypothetical, earlier discharge as of the time of the litigation discovery of adverse information is precisely the same as sanctioning actual discharges on the basis of discriminatory or retaliatory investigations. Both practices are antithetical to the anti-discrimination goals of the ADEA and should not be permitted.¹⁸

(ii) At a minimum, then, to limit damages, an employer would have to prove two entirely speculative facts—that absent the lawsuit, the adverse information would have been discovered, and would have been discovered at some particular time.¹⁹ While it is possible to

¹⁸ Questions concerning whether information revealing employee misconduct obtained after discharge is admissible at the liability stage present very different issues, and need not be addressed in this case. For example, there may be circumstances in which resume misrepresentations discovered after discharge are pertinent for impeachment purposes, either to contest some affirmative plaintiff testimony or to demonstrate that the plaintiff has made misrepresentations at other times. Or it is possible that where an employer is trying to prove a neutral, nonpretextual basis for a discharge, evidence that an employee at other times committed acts similar to those for which he or she was discharged might be probative in showing that he or she in fact committed the act for which the discharge was imposed. Ordinary evidentiary principles concerning the balance of probative value against probable prejudicial impact would apply to these circumstances, see Fed.R.Evid. 403, which are quite different from those discussed in the text.

¹⁹ We note that even where there are objective facts sufficient to indicate that the information would have come to light eventually, concrete information concerning when that information would have been discovered is likely to be more difficult to come by.

There may be circumstances, of course, in which the information in question was *in fact* uncovered after the discharge but inde-

imagine circumstances in which these facts could be proven to a fair degree of certainty (although probably to a lesser degree of certainty than the "doomed steamship" example considered too speculative in the tort context), those circumstances are likely to be rare.²⁰

(b) Second, there are the entirely speculative questions whether or not the employer, having obtained the adverse information, would have in fact discharged the plaintiff; if so, whether that discharge would have been legitimate rather than discriminatory or retaliatory; and if so, when the discharge would have occurred.

These complex, interrelated questions cannot be answered simply by showing that the employee in fact committed an infraction of an established rule, even a serious one. As *McDonald, supra*, and *McDonnell Douglas, supra*, indicate, employers do not always take adverse action even against serious wrongdoers. There are often a myriad of competing considerations, particularly where the issue is discharge, including: an employee's special, irreplaceable skills; the state of the market for similar employees; the length of an employee's employment and his previous employment record; any mitigating circumstances that explain the rule violation; whether

pendently of the lawsuit and free of any discriminatory intent. For example, an employer might be able to demonstrate that sometime after a plaintiff was discharged but before the discrimination charge or lawsuit was filed, the employer did a general audit in the ordinary course of business which uncovered the plaintiff's record keeping errors. Such a showing would eliminate the question of discovery of the adverse information as a speculative one, but would leave hypothetical the question whether or not the individual would have been fired as a result of that information and, if so, when.

²⁰ For example, in the situation posited in the previous footnote, it is possible that a regularly-scheduled audit, conducted in the same way each year and in a way that almost certainly would discover recordkeeping errors, would suffice to demonstrate that discovery would have occurred even if the audit that turned up the error took place *after* the employer learned of the recordkeeping error through discovery in the lawsuit.

the employee has taken concrete steps to correct the circumstances that gave rise to the violation, such as undergoing treatment for alcoholism after driving while drunk; the likely impact of discharging a particular individual or individuals upon the morale of the workplace or the performance of other employees; whether the rule infraction actually caused any concrete harm to the employer; and intangible considerations such as the friendship between the employee and his or her superiors, or between the employee and other individuals or firms upon whom the employer is economically dependent.

Personnel directors and other managerial personnel responsible for discipline of employees take just such considerations into account, as the literature concerning the complex calculations that go into discharge decisions attest. See, e.g., Buckman, *To Fire or Not to Fire*, in Stone, ed., *The American Management Association Handbook of Supervisory Management* (1989). Arbitrators too take these considerations into account in determining whether or not a particular discharge was for "just cause", and regularly reinstate individuals as having been discharged without "just cause" where, for example, the infraction, albeit a fairly serious one, was an isolated event in a long, favorable employment record. Frank Elkouri & Edna Elkouri, *How Arbitration Works* 670-88 (4th ed. 1985); see also *id.* at 692 ("in the vast majority of cases there is no . . . 'automatic' basis for discharge; . . . all factors relevant to industrial discipline may be considered by the arbitrator in determining whether the employee deserved discharge, some lesser penalty, or no penalty at all—each case is thus decided on the basis of its own facts and circumstances.")

Recreating the balancing of competing factors that the employer would have arrived at absent the discriminatory discharge would seem unduly speculative in almost all circumstances.²¹

²¹ Again, it is possible to imagine very limited circumstances in which such proof would rise to a fair level of certainty. An

2. *Proof of Economic Damages*: Assuming that the defendant employer, although found to have violated the ADEA, were permitted to reduce Ms. McKennon's economic damages award by proving such contingent facts, the adequacy of the evidence proffered by the employer to prove those facts would have to be analyzed in the context of settled principles regarding the proof of compensatory damages, and of the equally settled principles regarding competent evidence.

The first of the proof of damages principles is that, where the fact of an injury can be proven, the plaintiff is entitled to recovery even if contingencies prevent the amount of damages from being ascertained with certainty. "[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.*, 282 U.S. at 562; Charles T. McCormick, *Handbook of the Law of Damages* §§ 26-27 (1935). While "damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture or surmise," (22 Am. Jur. 2d, *Damages* § 489 (1988)), it is enough "if the evidence shows the extent of the damages as a result of just and reasonable inference." *Story Parchment*, 282 U.S. at 563. So, for example, as a general matter the fact that there is some possibility that an employee might have ceased to be employed does *not* limit the assessment of damages for wrongful termination:

Plaintiff might become ill, or his employer might terminate his employment for some reason or the plant in which the plaintiff is working might be destroyed. Yet the law permits recovery for wages lost

employer might be able to demonstrate with objective evidence of past practice that its approach is not in fact to balance competing considerations with regard to one or more particular, explicitly forbidden infractions, but to apply an unalterable policy with regard to any employee found to have engaged in that conduct. (Again, however, even such proof would not survive the "doomed steamship" analysis).

as a result of injury despite the possibility of the happenings stated. [*Nager v. Nager*, 339 S.W.2d 492, 498 (Mo. Ct. App. 1960).]

See also, *Story Parchment*, 282 U.S. at 563 ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured party, and thereby relieve the wrongdoer from making any amend for his acts.")

The second of these proof of damages principles is that, while damages need not be certain to be recovered, neither can they be based on "mere speculation or guess." *Story Parchment*, 282 U.S. at 563; *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 559 (1941) ("an estimate [must] be made upon judgment and not guesswork."); Charles McCormick, *Handbook of the Law of Damages* § 26 ("the jury must have factual data—something more than guesswork—to guide them in fixing the award"). This rule applies both to contingencies sought to be introduced to enhance the damage award and contingencies sought to be introduced to reduce the award. See, e.g., *Noble v. Tweedy*, 203 P.2d 778, 782 (Cal. Ct. App. 1949):

The possibilities of a breach by plaintiffs, or insolvency, or of a destruction of the building, are wholly speculative and fanciful. It is clear that damages could not be *granted* upon the basis of anticipated future injuries or other events as purely hypothetical as these; and it follows that by way of analogy, that they likewise do not constitute a basis for *denying* a recovery for damages which are otherwise reasonably certain to be sustained. [Emphasis in original.]

See also *Proulx v. Citibank, N.A.*, 681 F. Supp. 199, 202 (S.D.N.Y. 1988) (refusing to award damages based on conjecture that employee would have been fired at a later date because "neither an award of damages, nor denial of them may be based on speculation." (citation omitted) *aff'd mem.* 862 F.2d 301 (2d Cir. 1988)).

The third proof of damages principle is that, where it is the defendant's wrong that prevents a precise calculation of damages, the risk of this uncertainty must be borne by the defendant. "The most elementary considerations of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 256 (1946); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); see McCormick, *Handbook of the Law of Damages* § 27.

Thus, in evaluating any evidence concerning whether the wrongfully terminated employee might have been discharged at some later date, the law of damages makes clear that (i) the possibility of such a contingency does not prevent damages from being awarded; (ii) such a contingency is not properly considered in calculating a damages award if the proffered evidence permits only substantial speculation or guesswork as to whether the contingency might occur; and (iii) if the contingent event cannot be proven with the requisite certainty because the employee was first wrongfully terminated, that is a risk the wrongdoer must bear.

Added to these considerations must be the general principle, encompassed in Fed. R. Evid. §§ 602 & 701, that, since admissible testimony must be based on personal knowledge, non-expert testimony premised on speculation or conjecture (including answers to questions about "what if" something had happened) is generally inadmissible entirely. 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure*, § 6026, at p. 231 (1990); Graham, *Handbook of Federal Evidence* § 611.18, at pp. 545-56 (1986); Joseph M. McLaughlin, *Federal Evidence Practice Guide* § 16.17[2] (1994). On this basis, courts routinely hold that "a witness may not testify to what he would have done had the situation been different from what it actually was." *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356, 360 (6th Cir. 1961); see also *Evanston Bank v. Brink's Inc.*, 853 F.2d 512, 515 (7th Cir. 1988) (objection to "question [as to]

... what the bank would have done under given circumstances" properly sustained because "this question would have required [the witness] to speculate about what might have happened"); *Roberts v. Sears, Roebuck & Co.*, 531 F. Supp. 784, 788 n.5 (N.D. Ill. 1982).

Taking these various considerations together and applying them to the present circumstances, it is apparent, first, that an employer's bare testimony, whether on the stand or by declaration, that an ADEA plaintiff would have been discharged other than when she actually was, and would have been discharged for a legitimate, non-discriminatory reason, is simply inadmissible as conjectural, and therefore insufficient to sustain the employer's burden on the damages issues in the case.²²

Second, any objective evidence offered to prove the hypothetical discharge must be sufficient to enable the fact of such discharge to be found without substantial speculation or conjecture. Thus, for example, proof of the existence of a firm rule proscribing certain conduct or of the seriousness of the offense, standing alone, will usually be insufficient, given the complex factors that usually go into discharge decisions, absent proof that the offense is one that in the past has uniformly led to discharge once discovered. If such proof is unavailable because the employer has not in the past dealt with a similar situation

²² On this basis alone, the judgment below should be reversed.

We note as well that even if such opinion testimony by parties to the litigation were admissible, when submitted in declaration form, on summary judgment, it is inadequate standing alone to meet the employer's affirmative burden of proof because "the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620, 628 (1944); compare *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986) (holding that it is not enough to defeat summary judgment concerning an issue of actual fact (rather than opinion or conjecture) that the fact concerns a state of mind and the testimony could be disbelieved, but not overruling *Sartor* or addressing the question whether the rule is the same for opinion testimony or for interested witnesses).

then, ordinarily, it would be speculative whether or not a lawful and proper discharge would have occurred.

In that event, the employer, as the adjudicated wrongdoer and the party that by initially discharging the plaintiff unlawfully precluded the possibility of ascertaining whether the legal discharge would have actually occurred must bear the consequences of his wrongdoing—viz., that it became impossible to prove what might have happened without undue speculation. The employee would then be entitled to full backpay relief to the date of judgment, since the employee, as the party who does not bear the risk of uncertainties in the calculation of damages, is entitled to the normal presumption that her employment would continue.

3. *Reinstatement*: In determining the availability of reinstatement relief, the primary governing criteria, once again, must be the twin goals of employment discrimination laws, eliminating discrimination generally and “making whole” the individual discriminatee. *Albemarle Paper Co.*, 422 U.S. at 405. And, those criteria, once again, lead at the very least to the conclusion that usually an ADEA plaintiff who proves she was discharged for discriminatory reasons should be reinstated unless the employer can demonstrate, on the basis of competent evidence, that absent the discriminatory actions, the employer would have discovered that the employee committed a dischargeable offense, and the employer would, in fact, on that lawful basis, have discharged the employee.²³

²³ Reinstatement, unlike ADEA damages, is an equitable remedy, and a remedy not covered by the well-developed principles concerning the determination of damages discussed above. For both reasons, it is possible that the level of proof with which the employer must establish the hypothetical facts that could limit the ordinary reinstatement remedy may be lower than is the case for damages. Even so, the kind of evidence relied upon in this case—bare statements by employer agents as to what would have happened—would clearly be insufficient, because inadmissible for any purpose as purely speculative. See p. 26, *supra*.

There are, however, circumstances in which this usual rule should be modified, sometimes to the effect of denying reinstatement that would be mandated by the “make whole” approach, and sometimes to the effect of requiring reinstatement even where the employer could show that the individual would not have been retained.

In the first category is the hypothetical circumstance, cited often in the court of appeals “after-acquired” evidence cases (see, e.g., *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988)), in which the individual in question held his or her job *illegally*, because of lack of a required license (the masquerading doctor example of *Summers*), failure to reach the requisite legal age requirement, or failure to meet some other explicit requirement set, not by the employer, but by the *government*. Under those circumstances, where reinstatement would violate clearly established public policy embodied in positive law, a court of equity should deny reinstatement, without more. Cf. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42, 45 n.12 (1987).

On the other hand, an order of reinstatement is a form of injunctive relief, and “[t]he injunctive remedy for a proven violation of law will often include commands that the law does not impose on the community at large.” *Teachers v. Hudson*, 475 U.S. 292, 309-310, n.22 (1986). There may well be instances in which the employer’s discriminatory acts will be blatant, while the employee’s infractions, although constituting a dischargeable offense under the employer’s standards, are not as an objective matter egregious. Under those circumstances, if the discriminatee is not returned to the workplace, the lesson conveyed to both the discriminatee and to other employees of the employer would be that acts of serious discrimination will not be fully redressed. In such circumstances, the employer’s *usual* managerial prerogatives, exercised through nondiscriminatory application of workplace rules, should not alone supply a basis for refusing reinstatement relief.

The National Labor Relations Board takes essentially this approach in determining whether to order reinstatement of employees who were discriminated against but have committed dischargeable offenses for which the employer would have fired them:

"While seeking to be excused from his obligation to reinstate or pay backpay because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to the efficiency of the plant." [*Owens Illinois*, 290 NLRB 1193 (1988), *enforced without opinion*, 872 F.2d 413 (3rd Cir. 1989), *quoting Mandarin*, 228 NLRB 930, 931-32 (1977).]

We would suggest that the considerations with regard to reinstatement under the ADEA are the same, and that the same principles should govern.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed, and this case should be remanded for further appropriate proceedings on the plaintiff's complaint.

Respectfully submitted,

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CHRISTINE MCKENNON,
Petitioner,

NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
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September 8, 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1543

CHRISTINE MCKENNON,
v. *Petitioner,*

NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**MOTION OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

Pursuant to Rules 37.1 and 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of Respondent in this case, the Nashville Banner Publishing Co. The written consent of Respondent for the submission of this brief has been filed with the Clerk of Court. Because counsel for Petitioner has not responded to correspondence and telephone calls seeking Petitioner's consent, the Chamber assumes that such consent is refused.

In support of this motion, the Chamber shows the following:

1. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents approximately 220,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in more than 300 cases of importance to the business community. Those cases include *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), *ABF Freight Systems, Inc. v. NLRB*, 114 S. Ct. 835 (1994), *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

2. Substantially all Chamber members, or their constituents, are employers subject to various equal employment opportunity laws, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 to 634 (Supp. IV 1992) ("ADEA"), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992) ("Title VII"), and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (the "1991 Civil Rights Act"). The Chamber has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this appeal, which transcend the interests of the parties to this case.

3. The issue before the Court—whether concealed employee misconduct which would have resulted in discharge bars an employment discrimination claim—is of direct and immediate interest to the Chamber and its members, who wish to maintain important workplace

standards of conduct. Allowing plaintiffs to recover notwithstanding employer proof of a prior dischargeable offense insulates employees who file suit from the normal consequences of their acts, and effectively sets aside normal workplace rules of conduct. Employees clever enough to conceal their wrongdoing reap a substantial and unjustified benefit when a court posits a continuing legal duty between them and an employer who could and would lawfully have ended the relationship.

4. These concerns are particularly acute when the entire employment relationship is founded on employee fraud. Recent studies conservatively estimate that 30% of job applicants materially misrepresent their credentials and qualifications for employment.* The rise in negligent hiring and retention claims, and, in many industries, a web of government regulations, require employers carefully to select qualified employees. Where an employer can prove that it would not have hired an employee based on either the substance of the misrepresentation or the misrepresentation itself, or that it would have fired the employee once the misrepresentation is discovered, the employee should not further benefit from the employment relationship by receiving damages for successfully concealing the fraud.**

* See generally Arthur A. Sloan, *Countering Resume Fraud Within and Beyond Banking: No Excuse for Not Doing More*, Lab. L.J., May 1993, 303, 303 (citing studies); Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 Stan. L. Rev. 175, 176 n.5 (1993) (citing studies); see also *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1186 (11th Cir. 1992) (Godbold, J., dissenting) ("[t]he problem of false applications for employment is major in scope") (citing authorities).

** See, e.g., *Jordan v. Johnson Controls, Inc.*, No. 05-93-00132-CV, 1994 WL 65650 at *4 (Tex. Ct. App. 1994) (ignoring after-acquired evidence would serve as an incentive "to deceive and mislead the prospective employer in every possible way" in order to gain employment).

5. The so-called "after-acquired evidence doctrine" seeks to harmonize these concerns with the central goal of federal laws prohibiting employment discrimination: establishing objective employment policies which are uniformly administered, thus ensuring equal treatment for all. Denying recovery to employees who have engaged in serious misconduct will provide a powerful incentive for employers to establish objective rules and to ensure their uniform administration, for without such actions an employer will be unable to prove the basic elements of such a defense. Recognizing this defense also will provide a powerful incentive to combat employee fraud and misconduct. The result will be more objective workplaces, less employee fraud, and less expenditure of scarce judicial resources on lawsuits that are unlikely to alter the ultimate legal relationship between the parties.

WHEREFORE, for the reasons stated, the Chamber respectfully requests that the Court grant it leave to file the accompanying brief as amicus curiae.

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QUESTION PRESENTED

May an employee who has committed but concealed serious misconduct sue an employer for age discrimination, despite employer proof that it would have discharged the employee had it known of the misconduct?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. AFTER-ACQUIRED EVIDENCE MAY BAR LIABILITY IN APPROPRIATE CASES.....	4
A. After-Acquired Evidence May Render It Im- possible for Plaintiff to Prove a Claim	6
B. After-Acquired Evidence May Preclude Lia- bility in Appropriate Cases Under Normally Applicable Legal and Equitable Defenses	9
II. AFTER-ACQUIRED EVIDENCE OF SERI- OUS MISCONDUCT LIMITS RECOVERY TO DECLARATORY RELIEF AND ATTORNEYS' FEES	20
III. EMPLOYERS RELYING UPON PREVIOUSLY CONCEALED EMPLOYEE MISCONDUCT MUST ESTABLISH THAT SUCH MISCON- DUCT WOULD HAVE WARRANTED TER- MINATION	25
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page
<i>ABF Freight Systems, Inc. v. NLRB</i> , 114 S. Ct. 835 (1994)	12
<i>Agbor v. Mountain Fuel Supply Co.</i> , 810 F. Supp. 1247 (D. Utah 1993)	26
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	15
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	7
<i>Anderson v. Savage Laboratories, Inc.</i> , 675 F.2d 1221 (11th Cir. 1982)	8
<i>Astoria Federal Savings & Loan Association v. Solimino</i> , 111 S. Ct. 2166 (1991)	11
<i>Baab v. AMR Services Corp.</i> , 811 F. Supp. 1246 (N.D. Ohio 1993)	26
<i>Bazzi v. Western & Southern Life Insurance Co.</i> , 808 F. Supp. 1306 (E.D. Mich. 1992), reversed on other grounds, 25 F.3d 1047 (table), 1994 U.S. App. LEXIS 14 (full text) (6th Cir. 1994) ..	18
<i>Benson v. Qualex Corp.</i> , 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992)	18
<i>Bonger v. American Water Works</i> , 789 F. Supp. 1102 (D. Colo. 1992)	26
<i>Bray v. Forest Pharmaceuticals, Inc.</i> , 812 F. Supp. 115 (S.D. Ohio 1993)	26
<i>Burke v. United States</i> , 112 S. Ct. 1867 (1992)	19
<i>Calloway v. Partners National Health Plans</i> , 986 F.2d 446 (11th Cir. 1993)	13
<i>Carpenter v. Ford Motor Co.</i> , 761 F. Supp. 62 (N.D. Ill. 1991)	13
<i>Carroll v. City of Chicago</i> , No. 87C 8995, 1990 WL 37631 (N.D. Ill. 1990)	26
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	7
<i>Chauffeurs, Teamsters & Helpers Local 391 v. Terry</i> , 494 U.S. 558 (1990)	10
<i>Churchman v. Pinkerton's, Inc.</i> , 756 F. Supp. 515 (D. Kan. 1991)	26
<i>City of Los Angeles Department of Water & Power v. Manhart</i> , 435 U.S. 702 (1978)	15

TABLE OF AUTHORITIES—Continued

	Page
<i>Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co.</i> , 839 F.2d 1147 (6th Cir.), cert. denied, 488 U.S. 899 (1988)	11
<i>College Point Boat Corp. v. United States</i> , 267 U.S. 12 (1925)	17
<i>Conlin v. Mission Foods Corp.</i> , 850 F. Supp. 856 (N.D. Cal. 1994)	28
<i>DeVoe v. Medi-Dyn, Inc.</i> , 782 F. Supp. 546 (D. Kan. 1992)	28
<i>Dotson v. United States Postal Service</i> , 977 F.2d 976 (6th Cir.), cert. denied, 113 S. Ct. 263 (1992)	5, 7
<i>EEOC v. Farmer Bros.</i> , 65 Fair Empl. Prac. Cas. (BNA) 857 (9th Cir. 1994)	6
<i>EEOC v. Prudential Federal Savings & Loan Association</i> , 763 F.2d 1166 (10th Cir.), cert. denied, 474 U.S. 946 (1985)	10
<i>East Texas Motor Freight System v. Rodriguez</i> , 431 U.S. 395 (1977)	7, 15
<i>Fair Employment Council v. BMC Mktg.</i> , 65 Fair Empl. Prac. Cas. (BNA) 612 (D.C. Cir. 1994) ..	20
<i>Fariss v. Lynchburg Foundry</i> , 769 F.2d 958 (4th Cir. 1985)	10
<i>Farrar v. Hobby</i> , 113 S. Ct. 566 (1992)	22
<i>First Commodity Traders, Inc. v. Heindol Commodities, Inc.</i> , 591 F. Supp. 812 (N.D. Ill. 1984), aff'd, 766 F.2d 1007 (7th Cir. 1985)	18
<i>Flesner v. Technical Communications Corp.</i> , 575 N.E.2d 1107 (Mass. 1991)	19
<i>Fogarty v. Fantasy</i> , 114 S. Ct. 1023 (1994)	11
<i>Franks v. Bowman Transportation Co.</i> , 495 F.2d 398 (5th Cir. 1974), reversed, 424 U.S. 747 (1976)	15
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 111 S. Ct. 1647 (1991)	15
<i>Hargett v. Delta Automotive, Inc.</i> , 765 F. Supp. 1487 (N.D. Ala. 1991)	13
<i>Holt v. Winpisinger</i> , 811 F.2d 1532 (D.C. Cir. 1987)	13

TABLE OF AUTHORITIES—Continued

	Page
<i>Irwin v. Department of Veterans Affairs</i> , 498 U.S. 89 (1990)	11
<i>John Cuneo, Inc.</i> , 298 NLRB 856 (1990)	16
<i>Johnson v. Honeywell Information Systems, Inc.</i> , 955 F.2d 409 (6th Cir. 1992)	5, 7
<i>Kristufek v. Hussman Foodservice Co., Toastmaster Division</i> , 985 F.2d 364 (7th Cir. 1993)	6
<i>Landgraf v. USI Film Products</i> , 114 S. Ct. 1483 (1994)	9, 10
<i>Langnes v. Green</i> , 282 U.S. 531 (1931)	15
<i>Leahey v. Federal Express Corp.</i> , 685 F. Supp. 127 (E.D. Va. 1988)	18
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	10
<i>Malone v. Signal Processing Technologies, Inc.</i> , 826 F. Supp. 370 (D. Colo. 1993)	27
<i>Mardell v. Harleysville Life Insurance Co.</i> , No. 93-3258, 1994 WL 396512 (3d Cir. 1994)	6
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	7
<i>Maxfield v. Sinclair, International</i> , 766 F.2d 788 (3d Cir. 1985), <i>cert. denied</i> , 474 U.S. 1057 (1986)	10
<i>McKennon v. Nashville Banner Publishing Co.</i> , 9 F.3d 539 (6th Cir. 1993), <i>cert. granted</i> , 114 S. Ct. 2099 (1994)	5, 25
<i>Milligan-Jensen v. Michigan Technology University</i> , 975 F.2d 302 (6th Cir. 1992), <i>cert. dismissed</i> , 114 S. Ct. 22 (1993)	5
<i>Murnane v. American Airlines, Inc.</i> , 667 F.2d 98 (D.C. Cir. 1981), <i>cert. denied</i> , 456 U.S. 915 (1982)	4, 5, 7
<i>O'Day v. McDonnell Douglas Helicopter Co.</i> , 784 F. Supp. 1466 (D. Ariz. 1992)	26
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	21, 22, 23
<i>Punahale v. United Air Lines, Inc.</i> , 756 F. Supp. 487 (D. Colo. 1991)	27
<i>Redd v. Fisher Controls</i> , 814 F. Supp. 547 (W.D. Tex. 1992)	26

TABLE OF AUTHORITIES—Continued

	Page
<i>Reed v. AMAX Coal Co.</i> , 971 F.2d 1295 (7th Cir. 1992)	6, 25
<i>Rich v. Westland Printers</i> , 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993)	6
<i>Robitzek v. Reliance Intercontinental Corp.</i> , 167 N.E.2d 74 (N.Y. 1960)	19
<i>Rupley v. Rorer Pharmaceutical Corp.</i> , No. 90 C 5597, 1992 WL 37121 (N.D. Ill. 1992)	28
<i>Schuessler v. Benchmark Marketing & Consulting</i> , 500 N.W.2d 529 (Neb. 1993)	19
<i>Smallwood v. United Air Lines, Inc.</i> , 728 F.2d 614 (4th Cir.), <i>cert. denied</i> , 469 U.S. 832 (1984)	4, 5, 7
<i>Smith v. General Scanning, Inc.</i> , 876 F.2d 1315 (7th Cir. 1989)	6
<i>St. Mary's Honor Center v. Hicks</i> , 113 S. Ct. 2742 (1993)	8
<i>Summers v. State Farm Mutual Automobile Insurance Co.</i> , 864 F.2d 700 (10th Cir. 1988)	4, 5, 8, 23, 26, 27
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	20
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981)	7, 25
<i>Tuohey v. Clark Oil & Refining Corp.</i> , No. 92 C 8358, 1994 WL 280084 (W.D. Ill. 1994)	27
<i>Wallace v. Dunn Construction Co.</i> , 968 F.2d 1174 (11th Cir. 1992)	4, 6, 7, 20, 25
<i>Washington v. Lake County</i> , 969 F.2d 250 (7th Cir. 1992)	6
<i>Welch v. Liberty Machine Works, Inc.</i> , 23 F.3d 1403 (8th Cir. 1994)	5, 27
<i>Women Employed v. Rinella & Rinella</i> , 468 F. Supp. 1123 (N.D. Ill. 1979)	13
<i>Woods v. Dunlop Tire Corp.</i> , 972 F.2d 36 (2d Cir. 1992), <i>cert. denied</i> , 113 S. Ct. 977 (1993)	11, 13
<i>Woods v. Ficker</i> , 768 F. Supp. 793 (N.D. Ala. 1991), <i>aff'd without opinion</i> , 972 F.2d 1350 (11th Cir. 1992)	13
<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385 (1982)	11

TABLE OF AUTHORITIES—Continued

STATUTES	Page
The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 to 634 (Supp. IV 1992)	<i>passim</i>
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992)	<i>passim</i>
The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071	<i>passim</i>
Section 1981 of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 (Supp. IV 1992)	19
Title I of the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990), codified as amended at 42 U.S.C. §§ 12101 to 12117 (Supp. IV 1992)	24
LEGISLATIVE MATERIALS	
H.R. Rep. No. 102-40, 102d Cong., 2d Sess., pt. I (Report of the House Education and Labor Committee on H.R. 1), reprinted in 1991 U.S.C.C.A.N. 549	21
H.R. Rep. No. 102-40, 102d Cong., 2d Sess., pt. II (Report of the House Judiciary Committee on H.R. 1), reprinted in 1991 U.S.C.C.A.N. 694	21
H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., reprinted in 1978 U.S.C.C.A.N. 528	10
137 Cong. Rec. S15,464 (daily ed. Oct. 30, 1991)	21
137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991)	21
137 Cong. Rec. H9529 (daily ed. Nov. 7, 1991)	22
137 Cong. Rec. H9539 (daily ed. Nov. 7, 1991)	22
137 Cong. Rec. H9543 (daily ed. Nov. 7, 1991)	22
137 Cong. Rec. H9547 (daily ed. Nov. 7, 1991)	22
137 Cong. Rec. H9553 (daily ed. Nov. 7, 1991)	22
SECONDARY AUTHORITIES	
Arthur Linton Corbin, <i>Corbin on Contracts</i> (1960)	17, 18
Dan B. Dobbs, <i>Handbook on the Law of Remedies</i> (1973)	10, 12, 17

TABLE OF AUTHORITIES—Continued

	Page
John J. Donohue III & Peter Siegelman, <i>The Changing Nature of Employment Discrimination Litigation</i> , 43 Stan. L. Rev. 983, 989 (1991) ..	9
Jennifer Miyoko Follette, Comment, <i>Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence</i> , 68 Wash. L. Rev. 651 (1993)	9
Samuel A. Mills, Note, <i>Toward an Equitable After-Acquired Evidence Rule</i> , 94 Colum. L. Rev. 1525 (1994)	23
William M. Muth, Jr., Note, <i>The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by Wallace v. Dunn Construction Co.</i> , 968 F.2d 1174 (11th Cir. 1992), 72 Neb. L. Rev. 330 (1993)	16
<i>Restatement (Second) of Agency</i> (1958)	18
<i>Restatement (Second) Contract</i> (1981)	17
Douglas L. Williams & Julia A. Davis, <i>Skeletons in the Closet: "After Acquired Evidence" As a Defense to Discrimination Claims</i> , C874 ALI-ABA 369 (1993)	7, 11, 23
Samuel Williston, <i>A Treatise on the Law of Contracts</i> (3d ed. 1962)	17, 18
MISCELLANEOUS	
<i>Daily Lab. Rep.</i> (BNA), No. 9, at AA-1 (Jan. 1, 1994)	9
Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, 3 EEOC Compliance Manual (BNA) N:2119, N:2133 n.17 (March 7, 1991)	23
Policy Guidance on Recent Developments in Disparate Treatment Theory, EEOC Compliance Manual (CCH) ¶ 2095 at 2099-40 (July 14, 1992)	23, 24

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion for leave to file this brief.

STATEMENT OF FACTS

Petitioner Christine McKennon, formerly a confidential secretary to the Comptroller of Respondent Nashville Banner Publishing Co. (the "Banner"), was one of nine employees laid off during a reduction in force in October 1990. She filed suit claiming that her layoff violated the Age Discrimination in Employment Act ("ADEA") and Tennessee state law. During her deposition, held on December 18, 1991, Petitioner admitted that she knew that she was forbidden to copy or disclose confidential and proprietary business information to which she had access in the course of her work, and that "if [she] showed these documents to anybody, [she] would have been terminated." (J.A.¹ at 154a; *see also* J.A. at 117a-118a, 132a-133a, 150a.) Nonetheless, Petitioner copied and removed from Respondent's premises the Fiscal Period Payroll Ledger (containing salaries and related financial information), the Banner's profit and loss statement, and several confidential documents from a manager's personnel file. J.A. 141a-154a.)

Based upon these admissions, Respondent filed a motion for summary judgment, supported by several uncontradicted affidavits as well as sworn deposition testimony, establishing that had Respondent been aware of Petitioner's actions, she would have been immediately terminated. The District Court granted the motion, finding that Petitioner's misconduct provided "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge." (*See* Appendix to the Petition for a Writ of Certiorari at 17a.) The Sixth Circuit affirmed. (*See id.* at 1a-9a.)

¹ References to the Joint Appendix are abbreviated in this brief as "J.A."

SUMMARY OF ARGUMENT

After-acquired evidence of serious employee misconduct may take many forms. Such evidence may directly reinforce an employer's stated reason for termination or prevent a plaintiff from establishing a central element of her claim; it also may concern issues that otherwise would not be relevant to the case, such as proof that the entire employment relationship was founded on fraud. For this reason, the sweeping claims of Petitioner and her amici—that after-acquired evidence *never* can play a role at the liability stage, and that such evidence *always* must play a certain specified role at the remedial phase—are not useful in addressing the questions posed by after-acquired evidence of serious employee misconduct in employment litigation.

Rather than recognizing the variety of issues that can be raised by after-acquired evidence of employee misconduct, Petitioner and her amici inveigh against a so-called *per se* rule allegedly adopted by the Sixth and Tenth Circuits. It is a far cry, however, from arguing that after-acquired evidence should not *always* bar relief to claiming that such evidence *never* can affect liability. Petitioner and her amici (save the United States, *see* Brief for the United States at 20 n.12) make precisely such an illogical and unwarranted leap, defending this result on policy grounds. Yet, virtually all of the policy concerns that supposedly justify their proposal—for example, that allowing after-acquired evidence to affect liability will dissuade potential plaintiffs from suit, or will inveigle the courts in collateral disputes—are completely undercut by their admission that after-acquired evidence should have a substantial role in employment discrimination litigation, albeit at the remedial phase.

This case, therefore, does not concern the viability *vel non* of after-acquired evidence in employment discrimination litigation; it concerns the use to which such evidence may be put. At the risk of oversimplification, we suggest that three important questions should be addressed by the Court, and answered in the following fashion.

- *Under what circumstances should after-acquired evidence of serious misconduct bar an employment discrimination claim?*

After-acquired evidence of serious employee misconduct relating to an issue otherwise relevant to the case—for example, evidence first discovered at deposition that precludes a plaintiff's showing of pretext, or establishes that the plaintiff was not qualified for the position in question—is competent to negate liability under standard summary judgment principles. After-acquired evidence of serious employee misconduct not otherwise relevant to the case should bar a claim where it deprives the plaintiff of the clean hands necessary to pursue equitable relief, indicates that the employment relationship was based upon fraud, or otherwise falls within a legal or equitable defense available in the federal courts. Nothing in the language or legislative history of the ADEA or Title VII indicates that Congress intended to restrict the range of otherwise available defenses in employment discrimination litigation. The availability of normal legal and equitable defenses generally will result in a barrier to liability where an employer can prove that the plaintiff engaged in serious misconduct or fraud which, absent concealment, would have precluded initial hire or would have resulted in termination.

- *What effect should after-acquired evidence have on remedies in employment discrimination litigation?*

Assuming that after-acquired evidence does not totally bar liability in a given case, it necessarily must bar any substantive relief to a plaintiff who has committed but concealed serious misconduct. Awarding reinstatement, back pay, or damages to a person shown to have obtained or retained her job through fraud provides an unwarranted judicial windfall to a plaintiff who either never should have been hired or should have been discharged. Moreover, awarding any relief beyond a declaratory judgment and attorneys' fees would treat such an employee more favorably than an employee who has engaged in no deception or concealment, an anomalous result at odds

with the intent of Congress as enunciated in the 1991 Civil Rights Act.

- *What predicate must an employer establish to rely upon after-acquired evidence as a defense to liability or imposition of a substantive remedy?*

After-acquired evidence sufficient to bar liability or limit relief (depending upon its character in any given case) must be material and, significantly, of the sort that would have resulted in a refusal to hire, or a decision to discharge, the plaintiff. Such proof may rest upon written employer rules, employer testimony, or affidavit evidence regarding workplace policies or the past treatment of the same or similar offenses.

ARGUMENT

I. AFTER-ACQUIRED EVIDENCE MAY BAR LIABILITY IN APPROPRIATE CASES.

The proposition that after-acquired evidence of serious employee misconduct *never* can affect liability in an employment discrimination case is demonstrably untrue. Indeed, the United States itself identifies two circumstances in which liability should be affected by after-acquired evidence:

- Where a plaintiff's hiring claim is undercut by post-refusal evidence that the plaintiff is not qualified for the job (*see Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1178 n.8 (11th Cir. 1992); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984); *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 102 (D.C. Cir. 1981), *cert denied*, 456 U.S. 915 (1982)); and
- Where a plaintiff obtains a job by misrepresenting an essential job qualification such as a medical degree (*see Summers v. State Farm Mut. Automobile Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988)).

See Brief of United States at 20 n.12.

These examples merely confirm a commonplace—that some concealed employee offenses must bar an employment discrimination claim. An applicant dishonestly claiming to be a physician has no legal claim against an employer who refuses to hire him as a doctor or terminates him because he lacks the medical knowledge necessary to treat patients. This is not the “innocent victim” of a “lawless employer,” as Petitioner and her amici repeatedly state; this is an individual engaged in serious and unjustifiable fraud who has no legal claim for mistreatment.²

The split in the circuits between the courts that consider after-acquired evidence a bar to liability³ and those

² Petitioner and her amici consistently refer to plaintiffs as “innocent victims” of “lawless employers,” based upon the proposition that, for purposes of a summary judgment motion, the claims of the party opposing the motion must be taken as true. Neither this procedural doctrine nor Petitioner's loaded language should preclude the Court from clearly assessing the contending parties in a normal after-acquired evidence dispute: an employer which is *alleged* to have discriminated against the plaintiff, and an employee who *indisputably* has committed serious misconduct or fraud.

³ The Sixth, Eighth, and Tenth Circuits have held that after-acquired evidence can preclude all recovery and bar employment discrimination claims in their entirety. *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993); *Milligan-Jensen v. Michigan Tech. Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Dotson v. United States Postal Serv.*, 977 F.2d 976 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992); *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994); *Summers*, 864 F.2d at 700 (10th Cir. 1988).

The Fourth Circuit also has held that when an employer discovers information on the grounds on which it would have refused to hire an applicant, and can show that the information would have been revealed in the normal course of the application process, the plaintiff is entitled to no relief on a failure to hire claim. *Smallwood*, 728 F.2d at 623-24; *see also Murnane*, 667 F.2d at 102 (D.C. Cir. 1981) (regardless of whether the employer discriminatorily failed to consider applicants, it can prove at trial that plaintiffs were not injured because they were not qualified and would

that view such evidence as a limitation on relief⁴ is based, in our view, upon inadequate analysis of the underlying doctrine itself. We suggest that the common-sense results discussed above can be justified on several separate and independent legal bases, any of which is sufficient in and of itself to bar liability in appropriate cases.

A. After-Acquired Evidence May Render It Impossible for Plaintiff to Prove A Claim.

Summary judgment is appropriate in employment discrimination cases, as in all other cases, when there are

not have been hired). In *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cas. (BNA) 379, 383 (D. Md. 1993), the court concluded that the Fourth Circuit would hold that summary judgment should be granted "when after-acquired evidence of fraud nullifies any remedies, thereby rendering any determination of liability moot" (citing cases).

⁴ The Seventh Circuit has recently recognized the after-acquired evidence defense as barring relief after the point at which the information is discovered. *Kristufek v. Hussman Foodservice Co., Toastmaster Div.*, 985 F.2d 364 (7th Cir. 1993); cf. *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 n.2 (7th Cir. 1989) (noting in dictum that after-acquired evidence of employee fraud could cut off back pay and reinstatement). In an earlier decision, however, the Seventh Circuit had indicated that after-acquired evidence of a dischargeable offense bars statutory discrimination claims. *Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992); cf. *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1298 (7th Cir. 1992) (noting that proof that the employer would have fired the employee is the appropriate inquiry to determine whether relief should be barred).

The Third and Eleventh Circuits have held that the after-acquired evidence defense is relevant only to damages, barring prospective relief but allowing back pay until the date of judgment unless the employer can prove that it would have discovered the evidence earlier in the absence of litigation. *Mardell v. Harleysville Life Ins. Co.*, No. 93-3258, 1994 WL 396512 (3d Cir. 1994); *Wallace*, 968 F.2d at 1174 (11th Cir. 1992).

See also *EEOC v. Farmer Bros.*, 65 Fair Empl. Prac. Cas. (BNA) 857, 864-65 (9th Cir. 1994) (discussing the after-acquired evidence doctrine in dictum; observing that the doctrine should not operate as an "absolute rule" regarding appropriate relief in resume fraud cases and that "common sense and a reasonably developed sense of equity" should guide the inquiry).

no genuine issues of material fact.⁵ When all of the evidence (including after-acquired evidence) indicates that a plaintiff cannot prove essential elements of her claim, there is no reason to continue the litigation. The clearest case for this result is that posited in *Wallace*, 968 F.2d at 1178 n.8, and applied in *Smallwood and Murnane*, see *supra*, note 3, where the plaintiff's hiring claim is undercut by after-acquired proof that she lacked a required college degree or otherwise was not qualified for the position in question. In such circumstances, the plaintiff would be unable to establish the essential requirement that she was qualified, see *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981), and no point would be served by further litigation.⁶ Likewise in discharge cases, a plaintiff's lack of qualifications may defeat a prima facie case and bar the claim if the employer proves that it would not have hired the plaintiff in the first place. E.g., *Johnson*, 955 F.2d at 414 (misrepresentations regarding college degrees on which employer relied at hiring barred state wrongful discharge claim); *Dotson*, 977 F.2d at 978 (granting summary judgment on discriminatory discharge claims where plaintiff concealed misconduct on basis of which he was not qualified for job and would not have been hired).

Similarly, under *Burdine*, the plaintiff bears the burden of proving that the nondiscriminatory reason articulated by the employer was a pretext for intentional discrimi-

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

⁶ Under existing law, summary judgment is appropriate in cases in which the plaintiff cannot establish qualification or another essential element of her claim. See generally Douglas L. Williams & Julia A. Davis, *Skeletons in the Closet: "After Acquired Evidence" As a Defense to Discrimination Claims*, C874 ALI-ABA 369, 375 (1993) [hereinafter "Williams & Davis"]. "The Supreme Court [has] recognized that a plaintiff with a negligible likelihood of personal recovery should not consume federal judicial resources, even if 'true' discrimination occurred." *Id.* at 377-78 (citing *East Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977)).

nation. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2746-47, 2749 (1993). After-acquired evidence may reinforce the employer's articulated reason so substantially that no judge or jury could find for the plaintiff, thus justifying summary judgment for the employer. For example, in *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir. 1988), the plaintiff was terminated after serving a disciplinary probation for falsifying insurance claim forms. Following his termination, State Farm discovered more than 150 additional instances of falsification unknown at the time of his discharge, many of which occurred following Summers's probationary period. Nothing in law or in logic required continuation of this litigation where the evidence (some after-acquired) plainly established that the employee could not prove pretext.⁷

These cases are merely illustrative of situations that may arise again and again. In each situation (and numerous others that can be imagined), evidence of employee misconduct discovered after the fact is directly relevant to an issue otherwise in the litigation. Where this is so, normal summary judgment principles may warrant judgment for the employer.

Petitioner and several of her amici, however, apparently would conclude that this case and like cases must be tried to their full conclusion because after-acquired evidence is relevant *only* to remedy, and *never* can affect liability. This conclusion makes no sense unless this Court is prepared to hold that after-acquired evidence is inadmissible at the liability phase of a case, a result that even Petitioner does not suggest. Assuming that evidence of concealed employee misconduct may be admitted if relevant, after-acquired evidence plainly can affect liability and, in

⁷ Cf. *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224-25 (11th Cir. 1982) (no proof that plaintiff's falsification of work records was a pretext for age discrimination where plaintiff conceded his misconduct and admitted that the employer uniformly discharged employees guilty of similar falsifications regardless of age).

appropriate cases, can warrant summary judgment for an employer.⁸

B. After-Acquired Evidence May Preclude Liability In Appropriate Cases Under Normally Applicable Legal and Equitable Defenses.

The more significant and interesting question in this case is whether after-acquired evidence of employee misconduct not otherwise relevant to issues pending in the case may bar liability. Recognizing a so-called "after-acquired evidence defense" in such circumstances is appropriate but, in most cases, facts establishing such a defense based on serious employee misconduct or fraud will bar liability under one of several traditional legal or equitable defenses.⁹

As this Court has long recognized, Title VII and the ADEA essentially provide for equitable rather than legal relief for successful litigants. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1490 (1994) (back pay under

⁸ Petitioner's argument runs directly contrary to this Court's approval of summary judgment, *see supra*, note 5, and to effective workload management by the federal courts. In 1970, 336 federal employment civil rights cases were filed in the federal courts. This number had risen to 7,613 by 1989, almost all of which were individual complaints. *See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 989 (1991) [hereinafter "Donohue & Siegelman"]. *See also id.* at 984 (discussing the concomitant shift from hiring to firing claims and the decline in the number of class actions filed). Meanwhile, the number of employment discrimination charges filed with the EEOC rose to a record high of nearly 88,000 in fiscal year 1993, about half of which alleged discriminatory discharge. *Daily Lab. Rep. (BNA)*, No. 9, at AA-1 (Jan. 1, 1994).

⁹ *See generally* Jennifer Miyoko Follette, *Comment, Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 Wash. L. Rev. 651, 660-62 (1993) [hereinafter "Follette"] (noting that "the majority approach implicitly applies the unclean hands doctrine . . . to balance the equities and consider whether plaintiff's own conduct should bar or reduce an award.").

Title VII is an equitable remedy); *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) (“[T]his Court has labeled back pay awarded under Title VII . . . as equitable.”); *see also Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (“the prohibitions of the ADEA were derived *in haec verba* from Title VII”) (footnote omitted); 42 U.S.C. § 2000e-5(g)(1) (Supp. IV 1992) (courts in Title VII cases may order such “equitable relief as the court deems appropriate”); *cf.* 29 U.S.C. § 626(b) (1988) (in ADEA cases, courts can grant “such legal or equitable relief as may be appropriate”).

The three principle components of relief under Title VII are injunctive, declaratory, and restitutionary, each of which has its roots in courts of equity and is decided by a judge rather than a jury.¹⁰ Dan B. Dobbs, *Handbook on the Law of Remedies* § 2.1 at 25-26, 28 (1973) [hereinafter “Dobbs”]. Under the ADEA, similarly, the preferred remedies are reinstatement and back pay. *E.g.*, *Maxfield v. Sinclair, Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1171-72 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); *see also* Brief of the United States at 11-12. Liquidated damages under the ADEA are a form of compensatory, rather than punitive, relief. *E.g.*, *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985) (citing H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S.C.C.A.N. 528, 535).

In light of the equitable nature of an action to remedy allegedly discriminatory employment practices, this Court and lower courts have recognized that equitable principles may be asserted in employment discrimination litigation.

¹⁰ This discussion is based on the law in effect at the time this case was decided. As set forth *infra*, Part II, the analysis is unchanged by the 1991 Civil Rights Act, which allows capped compensatory and punitive damages under Title VII, but not the ADEA. The 1991 Civil Rights Act is not retroactively applicable to this case. *Landgraf*, 114 S. Ct. at 1508.

E.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (the statutory charge-filing requirement is not jurisdictional in nature, but a requirement that “is subject to waiver, estoppel, and equitable tolling”).¹¹ Lower courts routinely consider defendants’ claims that the equitable doctrine of laches bars otherwise sustainable and meritorious employment discrimination claims. *E.g.*, *Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co.*, 839 F.2d 1147, 1153 (6th Cir.) (“[T]he doctrine of laches, like other equitable considerations, should be applicable to a Title VII proceeding in practice as well as theory.”), *cert. denied*, 488 U.S. 899 (1988).

Nothing in the text or legislative history of the ADEA or Title VII suggests that Congress intended to bar litigants from asserting affirmative equitable defenses based on after-acquired evidence.¹² For example, nothing in

¹¹ While *Zipes* involved equitable doctrines being used to assist plaintiffs, there is absolutely no justification why equitable doctrines may not also assist defendants. As the old adage goes: “What’s sauce for the goose is sauce for the gander.” *See Fogarty v. Fantasy*, 114 S. Ct. 1023, 1033-35 (1994) (Thomas, J., concurring) (in deciding appropriate standard for award of attorneys’ fees to prevailing parties in copyright infringement actions, Court properly interpreted statutory language as making fees award for either party a matter within the trial court’s discretion, and should have taken the same “even-handed” approach in establishing the standard for award of attorneys’ fees under similar fees provision in Title VII); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (“the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States”).

¹² *See Astoria Federal Sav. & Loan Ass’n v. Solimino*, 111 S. Ct. 2166, 2169-70 (1991) (“[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’”) (citations omitted); *cf. Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992) (“the language and policy of Title VII do not undercut the applicability of res judicata, and we see no reason militating against application of well-settled claim preclusion principles”), *cert. denied*, 113 S. Ct. 977 (1993). The same equitable defenses are available under the 1991 Civil Rights Act. *See infra*, Part II; Williams

either statute states or even implies that the equitable defense of unclean hands is inapplicable in an employment discrimination case. Under the unclean hands doctrine, a plaintiff is barred from receiving any form of equitable relief to which he or she otherwise would be entitled, if the plaintiff comes before the court having committed "any sort of conduct that equity considers unethical, even if that conduct is perfectly legal." Dobbs § 2.4 at 46. See also *ABF Freight Sys., Inc. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia and O'Connor, JJ., concurring) ("[t]he 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, no matter how improper may have been the behavior of the defendant'" (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 342 U.S. 806, 816 (1945))).¹³

& Davis, *supra*, note 6, at 375-77 (explaining that the 1991 Civil Rights Act "does not exclude [a] standing argument").

¹³ In *ABF Freight Systems*, this Court reviewed only the very narrow question of whether to sustain the NLRB's determination that a union employee's post-firing lie under oath to an administrative law judge (during unfair labor practice proceedings stemming from his discharge) did not cause him to forfeit the remedies of reinstatement and back pay. 114 S. Ct. at 839 & n.8. Although both the majority and concurring opinions expressed concern regarding the employee's perjury and the Board's treatment of it, *id.* at 839-41, the Court upheld the Board's ruling based on "Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the [National Labor Relations] Act." *Id.* at 839. Thus, for a number of reasons, *ABF Freight Systems* does not resolve the instant dispute. First and foremost, no congressional delegation of policy-making and quasi-judicial decisionmaking authority is at issue here, and the judicial deference accorded to the NLRB in *ABF Freight Systems* has no applicability. Second, as this Court tacitly explained by avoiding discussion in *ABF* of the after-acquired evidence cases, the after-acquired evidence doctrine simply does not square with the facts in *ABF*. Unlike Petitioner and the other plaintiffs in the after-acquired evidence cases, the union employee committed his damning misconduct—lying under oath—after rather than during or before his employment. See *id.* at 837. Moreover, *ABF* did not assertedly base its discharge decision on the apparent

Accordingly, an unclean hands defense has been accepted as a bar to liability in a variety of employment discrimination cases. For example, in *Women Employed v. Rinella & Rinella*, 468 F. Supp. 1123 (N.D. Ill. 1979), the court denied equitable relief to a female secretary bringing claims of sexual harassment because the plaintiff had harassed her employer following her discharge. Similarly, when a plaintiff asserts in Title VII litigation a position that is plainly at odds with his earlier conduct, his unclean hands will bar the claim. *Woods v. Ficker*, 768 F. Supp. 793, 802 (N.D. Ala. 1991) (describing a "bad case" of unclean hands which, if not fatal, "operates as an estoppel"), *aff'd without opinion*, 972 F.2d 1350 (11th Cir. 1992).¹⁴

falsehood, but on the pretextual grounds that the employee had violated a new tardiness rule. *Id.* at 838 & n.5. Thus, the Court was not presented with the issue confronting it today.

¹⁴ See also *Holt v. Winpisinger*, 811 F.2d 1532, 1542 (D.C. Cir. 1987) (considering but rejecting defendant's unclean hands defense to an employee's claim for pension benefits brought under ERISA where the employee had obtained employment in violation of "loosely observed" policies and where such violation was "easily discoverable" and resulted in no unfairness to the employer); *Carpenter v. Ford Motor Co.*, 761 F. Supp. 62, 66 (N.D. Ill. 1991) (unclean hands defense may be asserted to Title VII claim, but defendant failed to plead with particularity the circumstances of the plaintiff's allegedly defrauding the employer regarding the reason for taking a medical leave of absence); *Hargett v. Delta Automotive, Inc.*, 765 F. Supp. 1487, 1489, 1492-93 (N.D. Ala. 1991) (equitable defenses are available to employers in Title VII actions, but the plaintiff's hands were only "smudged," and not unclean, where she had become pregnant by a customer, shared that information with her employer, and thereby caused the loss of the customer). Cf. *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 451 (11th Cir. 1993) (where employer defended plaintiff's claims that she was paid less because of her race on after-acquired evidence that the plaintiff had lied about having a college degree when she was hired, an unclean hands defense would fail because neither the plaintiff's predecessor nor successor was required to have a college degree and the employer did not prove it was injured by hiring the plaintiff).

Petitioner and her amici argue that an "after-acquired evidence defense" cannot be justified on unclean hands principles. We disagree. In many situations, after-acquired evidence reveals such profound employee misconduct as to give rise to an unclean hands defense that should bar liability under traditional equitable principles. For example, consider an employee working for a drug company which manufactures narcotics who is fired for poor performance. After the employee files a Title VII suit challenging his discharge, a police investigation reveals that the employee was stealing large quantities of drugs and selling them while at work. By violating strict workplace policies on theft and drug abuse (to say nothing of a wide variety of federal and state laws), the employee's offense should be considered so substantial as to preclude relief under standard equitable principles. Nothing in the ADEA or Title VII establishes that this individual, who would have no other claims against the employer under the unclean hands doctrine, should be entitled to pursue a claim for back pay, reinstatement, or mental anguish under the civil rights laws.

Petitioner and her amici argue to the contrary, on grounds that equitable doctrines should not be allowed to defeat the "purposes" of a civil rights statute. We strongly disagree that recognition of a standard equitable doctrine such as unclean hands would defeat the purposes of the ADEA or Title VII. Even more important, we believe that this formulation obscures the question, because it assumes that strong policy considerations are in direct conflict with application of normal equitable defenses; only then would it be appropriate to conclude that Congress intended to suspend principles otherwise applicable to federal and state court litigation.

Petitioner and her amici cannot demonstrate any such conflict. Indeed, many of the allegedly inappropriate results claimed by Petitioner and her amici will occur under their proposed wooden reading of the ADEA and Title VII. If after-acquired evidence of serious employee misconduct is recognized in the remedial phase of an employ-

ment discrimination case, as Petitioner proposes, prospective plaintiffs presumably will be inhibited by analysis of their past histories and litigation over "collateral disputes" will proliferate.

Neither will the twin goals of making plaintiffs whole or providing an incentive for employer compliance be frustrated by recognizing such a standard equitable defense. This Court previously acknowledged that denial of back pay on equitable grounds in a particular dispute does not frustrate the broader goals of eradicating discrimination and making persons whole for injuries caused by discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). As this Court cautioned, appellate courts should bear in mind "that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Id.* at 421-22. In *Albemarle*, the court indicated that the equitable defense of laches may bar part or all of a back pay claim, nothing that "[t]o deny back pay because a particular cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII." *Id.* at 424.¹⁵

¹⁵ See also *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (approving denial of back pay remedy where plaintiffs had proved sex-based actuarial practices but where an award of back pay would have had drastic effects on pension funds); *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) (an employer may prove that an employee who lacked essential qualifications would not have been hired, and therefore did not suffer any injury under Title VII); *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 406 (5th Cir. 1974) ("In the proper case, laches might be applied to bar a claim entirely, or it might bar only part of the remedy sought, such as the back pay award or a portion of it."); *reversed on other grounds*, 424 U.S. 747, 764 (1976) (federal courts have power under Title VII "to fashion such relief as the particular circumstances of a case may require to effect restitution"); *Langnes v. Green*, 282 U.S. 531, 541 (1931) (trial courts have discretion to identify a "just result" under the particular facts of each case) (cited in *Albemarle*, 422 U.S. at 424); cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1653 (1991) (no inconsistency between social goal of eradicat-

Moreover, it is absolutely fanciful to believe that recognition of a standard equitable defense will materially inhibit employer efforts to comply with the civil rights laws. Petitioner's apparent contention is that the very possibility of discovering some wrongful act in a particular plaintiff's background will convince employers to abandon all efforts at compliance. Depending upon the chance of occasionally discovering a deceitful plaintiff is hardly an alternative to full-fledged compliance with the laws, especially in light of the significantly enhanced damage remedies provided under the 1991 Civil Rights Act. Denying relief to a particular plaintiff in highly individualized circumstances does not conflict with the congressional goal of fostering equal opportunity for all.

Indeed, recognition that after-acquired evidence of serious employee misconduct can have a significant impact in employment litigation should foster the goals of the law. As we suggest *infra*, in Part III, employers seeking to depend upon after-acquired evidence of serious employee misconduct must be prepared to prove that the conduct would have resulted in termination had it been discovered. In order to do so, evidence of uniform rules applied in an even-handed manner will be critical. This very fact will impel employers to develop and maintain objective policies and to ensure their uniform administration.¹⁶

ing age discrimination and enforcement of individual agreements to arbitrate age claims); *John Cuneo, Inc.*, 298 NLRB 856 (1990) (unclean hands may preclude usual remedy of reinstatement).

¹⁶ The proposition that employers will establish discharge standards in order to trap unwary employees could only be posited by individuals who have never been employers. Employers invest huge sums in hiring and training a qualified workforce: in companies with substantial labor costs, employee productivity may be the single most significant factor in a company's success. Companies desirous of maintaining a highly qualified workforce are hardly likely to manipulate employment standards so as to trap unwary employees in "innocuous misconduct," as opposed to establishing legitimate standards based upon the needs of the business. See generally William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992), 72

Unclean hands is only one of many possible equitable and legal defenses in which after-acquired evidence of unrelated employee misconduct may be determinative. For example, it is hornbook law that in order to form a valid contract, there must be a "meeting of the minds." 6 Arthur Linton Corbin, *Corbin on Contracts* § 536 at 33-34 (1960) [hereinafter "Corbin"]. When a contractual relationship is induced by fraud, there is no such meeting of the minds and the employment contract is voidable. See generally *Restatement (Second) of Contracts* § 164(1) (1981); 1 Corbin § 6 (1963); Dobbs § 9.1 at 593-94. Likewise, conduct during contract performance which would have justified terminating the contract constitutes a defense to a breach of contract claim, whether or not the conduct was known when the alleged breach occurred. *College Point Boat Corp. v. United States*, 267 U.S. 12, 15 (1925) ("A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact.") (footnote omitted).¹⁷ Agency principles reinforce this contract law maxim. "If a principal has cause for the

Neb. L. Rev. 330, 347 (1993) [hereinafter "Muth"] ("The *Wallace* court's concerns over the employer setting an abnormally low standard for termination is [sic] not justified. . . . [A]n employer would have to systematically hire and fire several employees for very minor infractions in order to establish the low standard. It seems highly illogical that an employer would engage in such a practice in hopes of getting away with discrimination in the future."); see also *id.* at 346-47 (criticizing *Wallace*'s reasoning that the after-acquired evidence doctrine encourages employers to "rummage" through personnel files to discover a reason for termination and to "sandbag" employees at termination with knowledge of dischargeable conduct).

¹⁷ See also 6 Samuel Williston, *A Treatise on the Law of Contracts* § 839 at 141 (3d ed. 1962) [hereinafter "Williston"] (a defendant "should be excused from liability if the plaintiff has failed in a material particular to perform his contract although the defendant at the time when he refused to perform or to continue performance was ignorant of the plaintiff's prior breach of obligation").

discharge of an agent and discharges him, the fact that the principal is not at the time aware that he has cause for discharge is immaterial." *Restatement (Second) of Agency* § 409(1) cmt. e (1958).¹⁸

Under this contractual rule, therefore, it makes no difference whether the independent grounds for terminating an at-will employee's contract—the employee's fraud or misconduct—is discovered before or after the employment contract is terminated. "[A]n employee cannot prevail in an action for wrongful discharge where the employee committed acts which were cause for termination, whether or not the employer knew of those acts at the time of discharge" *Benson v. Quanex Corp.*, 58 Fair Empl. Prac. Cas. (BNA) 743, 746 (E.D. Mich 1992) (noting that federal and state courts have recognized this principle in breach of contract cases for "more than 100 years"). Accordingly, state and federal courts have repeatedly ruled that state law breach of contract or tort claims arising out of termination of employment are barred by after-acquired evidence of employee fraud or misconduct.¹⁹

¹⁸ See also 5 Williston § 744 at 531 (3d ed. 1961) ("[i]f when [a servant] was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to [the master] or whether the reason assigned for such discharge was sufficient, [the master is not] precluded by the first or any notice of discharge from proving an existing ground not therein referred to" (citation omitted)); 3A Corbin § 762 at 526 (1960) ("[I]n the relation of master and servant, if the servant has given sufficient cause for discharge the master is privileged to discharge him. The fact that the master omits to mention this cause, either because he does not know it or because he prefers to state some other reason, does not deprive him of his privilege.").

¹⁹ E.g., *Bazzi v. Western & S. Life Ins. Co.*, 808 F. Supp. 1306 (E.D. Mich. 1992) (breach of contract claim barred due to fraud in the inducement), *reversed on other grounds*, 25 F.3d 1047 (table), 1994 U.S. App. LEXIS 14,410 (full text) (6th Cir. 1994); *Leahey v. Federal Express Corp.*, 685 F. Supp. 127 (E.D. Va. 1988) (after-acquired evidence of employee's sexual and racial slurs can bar at-will employee's wrongful discharge claim); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 591 F. Supp. 812,

The fundamentally contractual employer-employee relationship undergirds the ADEA and Title VII.²⁰ These statutes implicitly assume that the employment relationship was legitimately obtained and continued in order for plaintiffs to benefit from their protection. Where this is not the case—for example, where the plaintiff has misrepresented an essential qualification, *see supra*, Part I.A., and Brief of the United States at 20 n.12—no valid employment relationship ever was established. This is true even where the employee's fraud was not discovered until litigation began.

A similar analysis would allow after-acquired evidence of employee misconduct not otherwise relevant to the litigation to form the basis for a claim of fraud, misrepresentation, or equitable estoppel as well. Indeed,

820 (N.D. Ill. 1984) (under Illinois law, "the party terminating a contract may assert any grounds justifying termination, whether or not it announced those grounds at the time of termination"), *aff'd*, 766 F.2d 1007 (7th Cir. 1985); *Schuessler v. Benchmark Mktg. & Consulting*, 500 N.W.2d 529 (Neb. 1993) (barring breach of contract claims where evidence of misconduct warranting termination was discovered after the employee's discharge); *Flesner v. Technical Communications Corp.*, 575 N.E.2d 1107 (Mass. 1991) (accepting after-acquired evidence of resume fraud as a complete defense to wrongful discharge, misrepresentation, breach of privacy, and state civil rights act claims, but remanding for determination whether plaintiff made material misrepresentations); *Robitzek v. Reliance Intercontinental Corp.*, 167 N.E.2d 74 (N.Y. 1960) (affirming summary judgment for employer on breach of contract claims where employer presented after-acquired evidence that employee falsely claimed to have bachelor's and master's degrees and employer relied on these misrepresentations in entering into employment contract).

²⁰ See *Burke v. United States*, 112 S. Ct. 1867, 1878 (1992) ("the rights guaranteed by Title VII are implied terms of every employment contract") (Souter, J., concurring) (quoting Charles A. Shanor and Samuel A. Marcossan, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 Lab. Law. 145, 174 n.118 (1990)). A closely related civil rights statute, 42 U.S.C. § 1981 (Supp. IV 1992), explicitly premises employment discrimination claims on contract law principles by ensuring that the right to "make and enforce contracts" is not abridged due to race.

in some situations such evidence will deprive a plaintiff of standing to sue. See *Wallace*, 968 F.2d at 1185 (Godbold, J., dissenting); cf. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 913 (1984) (Powell and Rehnquist, JJ., dissenting) (disagreeing with majority's view that it was within the discretion of the NLRB to define "employee" under the NLRA to include undocumented aliens and to extend remedies to such persons; "It is unlikely that Congress intended the term "employee" to include—for purposes of being accorded the benefits of that protective statute—persons wanted by the United States for the violation of our criminal laws."); *Fair Employment Council v. BMC Mktg.*, 65 Fair Empl. Prac. Cas. (BNA) 512, 513-16 (D.C. Cir. 1994) (individual "testers" lack standing to pursue Title VII and § 1981 damages claims because they lack a cognizable injury; injunctive relief also unavailable because defendant had "no duty to continue to consider" the testers once their fictitious credential were made known).

The essential point in all of these cases is not that an after-acquired evidence defense must be justified by one or another of these doctrines, but that after-acquired evidence of employee misconduct in appropriate circumstances may generate a valid defense under one or more of these existing doctrines. No arguments made by Petitioner or her amici should be allowed to obscure this fundamental principle.

II. AFTER-ACQUIRED EVIDENCE OF SERIOUS MISCONDUCT LIMITS RECOVERY TO DECLARATORY RELIEF AND ATTORNEYS' FEES.

In cases where the after-acquired evidence may not bar liability *in toto*—for example, where the evidence does not preclude the plaintiff from proving an essential element of her claim, or warrant entry of summary judgment for the employer on the basis of a recognized defense—the evidence nonetheless may be sufficient to affect the plaintiff's remedy. In such cases, assuming the plaintiff proves her case on the merits and the employer establishes fraud or misconduct through after-acquired evi-

dence, her recovery should be limited to declaratory relief and attorneys' fees.

Limiting recovery to declaratory relief and attorneys' fees would be consistent with Section 107 of the Civil Rights Act of 1991,²¹ which addresses a closely analogous situation, an employment action taken on the basis of both a lawful and an unlawful motive. In such cases, Congress decreed that if the plaintiff proves that reliance upon an unlawful motive was a motivating factor of her treatment, and the employer proves that she would have been treated in the same fashion regardless of the unlawful motive, the plaintiff's recovery is limited to declaratory relief plus attorneys' fees. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (Supp. IV 1992). Notably, Congress rejected H.R. 1, the House version of the 1991 Civil Rights Act which (in Section 103) had called for compensatory and punitive damages in mixed-motive cases,²² in favor of S. 1745, the Senate version of the bill, which (in Section 107) called for much more limited relief in these cases.²³

²¹ Section 107 was a congressional response to this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which dealt with proof issues in mixed-motive cases, not remedies issues in such cases.

²² See generally H.R. Rep. No. 102-40, 102d Cong., 2d Sess., pt. I (Report of the House Education and Labor Committee on H.R. 1), at 45-48, 157-58, reprinted in 1991 U.S.C.C.A.N. at 583-86, 686-87; pt. II (Report of the House Judiciary Committee on H.R. 1), at 16-19, reprinted in 1991 U.S.C.C.A.N. at 709-12. Nine members of the House Judiciary Committee included their dissenting views in the Committee Report, advocating an alternative proposal which would have limited relief in mixed-motive cases to "cease and desist" orders, attorneys' fees, and costs. *Id.* at 65-66, reprinted in 1991 U.S.C.C.A.N. at 751-52.

²³ No Senate Report was issued in connection with S. 1745. For Senate floor debate regarding Section 107 of this legislation, see 137 Cong. Rec. S15,464 (daily ed. Oct. 30, 1991) (statement of Sen. Dodd); *id.* at S15,476 (statement of Sen. Dole, presenting the Bush Administration's views on Section 107). When the House considered S. 1745 after it had been approved by the Senate, the limited relief in mixed-motive cases was specifically hailed as an

Contrary to the arguments of Petitioner and her amici, the plaintiff in an after-acquired evidence case is not entitled to greater relief than a plaintiff in a mixed-motive case. In both cases, discriminatory motive is presumed. The sole difference between the two plaintiffs is that, in the after-acquired evidence case, the plaintiff was successful in concealing her misdeeds, while in the mixed-motive case the employee's misconduct was discovered. Allowing the plaintiff in an after-acquired evidence case a greater recovery, as Petitioner and her amici propose, rewards fraud and concealment. Nowhere in the text or legislative history of the ADEA, Title VII, or indeed, any federal civil rights law is there any indication that Congress sought to reward employees who successfully hide their misconduct, as compared with employees whose misconduct is discovered while employed.

Limiting recovery in this fashion also comports with the fundamental principle that an employee who gains or retains her job through deceit has no legal claim to continue employment and thus is not in fact injured by the employer's conduct. These considerations motivated Congress in Section 107. *See also Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) ("Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind").²⁴ Although Congress in Section 107 modified the Court's holding in *Price Waterhouse* that a mixed-motive defense may negate liability to a rule that such a defense may severely restrict

appropriate component of the compromise bill. *See, e.g.*, 137 Cong. Rec. H9543 (daily ed. Nov. 7, 1991) (comments of Rep. Hyde); *id.* at H9547 (legislative history prepared by Rep. Hyde); *id.* at 9550 (comments of Rep. Hyde). *See also id.* at H9529 (interpretive memorandum prepared by Rep. Edwards); *id.* at H9539 (comments of Rep. Clay); *id.* at H9553 (comments of Rep. LaFalce).

²⁴ *Cf. Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992) (in § 1983 action, where plaintiff fails to prove an essential element of his claim for relief—here, an "actual compensable injury"—"the only reasonable [attorneys'] fee is usually no fee at all") (citation omitted).

relief, Congress approved of the logic that plaintiffs should not be compensated in such "no harm, no foul" situations. Both *Price Waterhouse* and Section 107 thus struck an appropriate balance between civil rights laws and employer rights. *See id.* at 242 (plurality opinion) noting that the "other important aspect" of Title VII is its "preservation of an employer's remaining freedom of choice"); 29 U.S.C. § 623(f)(3) (no ADEA violation if decision is based on "good cause").

Borrowing this principle from the Civil Rights Act of 1991—which admittedly does not apply to this case—avoids the convoluted and unrealistic relief inquiry suggested by Petitioner and her amici. With all due respect for the expertise of the EEOC,²⁵ an inquiry into when an employer would have discovered the plaintiff's misconduct is precisely the type of hypothetical collateral dispute that wastes judicial resources while accomplishing nothing.²⁶ Indeed, Petitioner and her amici implicitly concede

²⁵ Notably, before the enactment of the 1991 Civil Rights Act—i.e., under the law in effect at the time this controversy arose—the EEOC had endorsed the *Summers* approach and issued a policy guidance stating that if an employer proves a dischargeable offense through after-acquired evidence, the "employer would not be required to reinstate the charging party or to provide back pay." Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, 3 EEOC Compliance Manual (BNA) N:2119, N:2133 n.17 (March 7, 1991) (citing *Summers*).

²⁶ *See generally* Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule*, 94 Colum. L. Rev. 1525, 1547-48 (1994) [hereinafter "Mills"] (criticizing the *Wallace* court's approach—extending the back pay period until judgment, unless the employer can prove it would have discovered the information in the absence of litigation—as potentially providing a windfall to the employee while at the same time failing to achieve its stated "make-whole" objective); *Williams & Davis, supra*, note 6, at 375 ("it is equally speculative to assume that the skeleton would have remained in the closet"). For this reason, a proposal to limit affirmative relief to the time before the employee wrongdoing actually was discovered (*see* EEOC Compliance Manual (CCH) ¶ 2095 at 2099-40 (July 14, 1992)) should also be rejected. Although such a proposal has the benefit of certainty (that is, the employee

as much, by acknowledging that in many cases an employer will be unable to prove that the wrongdoing would have been discovered at any specific time. There could be no clearer example of rewarding the unscrupulous employee than reserving *complete* relief for those whose deceit is so manifest that not only did the employer fail to discover it while the plaintiff was employed, but is forced to concede that the plaintiff covered her tracks so skillfully that her wrongdoing never would have been discovered!

Limiting relief in this fashion further avoids the even more fanciful inquiries proposed by the EEOC under the 1991 Civil Rights Act (and Title I of the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990), codified as amended at 42 U.S.C. §§ 12101 to 12117 (Supp. IV 1992) ("ADA")). EEOC takes the position that a plaintiff cannot recover "the portion of compensatory damages . . . that would cover losses arising after" the date on which the misconduct is discovered. Policy Guidance on Recent Developments in Disparate Treatment Theory, EEOC Compliance Manual (CCH) ¶ 2095 at 2099-40 to 2099-41 (July 14, 1992). Are Title VII (and ADA) cases going to become contests in which psychiatrists will attempt to parse a plaintiff's mental anguish by time; for example, that 70% of plaintiff's mental anguish was suffered prior to her deposition? Can a plaintiff recover for the mental anguish suffered during her deposition, when she finally reveals her misdeeds? Or are we to presume that the plaintiff's now-clear conscience is of sufficient benefit to overbear her embarrassment at finally being caught?

Down this road lies madness. There is no indication that a Congress which limited similarly situated plaintiffs to declaratory relief plus attorneys' fees ever contem-

wrongdoing by definition would have been discovered on a date certain in order to be asserted in the litigation), such a rule still would benefit those who conceal their misdeeds until they are discovered in litigation. It also would create incentives to delay, obfuscate, and avoid the discovery process.

plated inquiries of this sort in after-acquired evidence cases (or indeed in any cases). Where an employer can prove that a plaintiff would have been discharged for previously undiscovered offenses, the plaintiff's recovery as a matter of law should be limited to declaratory relief plus attorneys' fees.

III. EMPLOYERS RELYING UPON PREVIOUSLY CONCEALED EMPLOYEE MISCONDUCT MUST ESTABLISH THAT SUCH MISCONDUCT WOULD HAVE WARRANTED TERMINATION.

Although the circumstances under which after-acquired evidence will provide a defense to an allegedly discriminatory discharge will vary based upon the nature of the evidence and the defense asserted, at a minimum an employer seeking to rely upon a prior concealed offense must prove that it would have terminated the employee on the basis of the previously concealed information. *E.g.*, *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539, 542 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994); *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1298 (7th Cir. 1992).

This requirement—which may be considered one of materiality—ensures that the after-acquired evidence would establish a legitimate, nondiscriminatory, and non-pretextual reason for the employment decision under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). As Judge Godbold explained in his dissenting opinion in *Wallace v. Dunn Construction Co.*, "[t]he reported cases . . . do not concern trivial falsities or conspiratorial concealment." 968 F.2d 1174, 1189 (11th Cir. 1992). Indeed, courts critical of the "after-acquired evidence defense" have not identified an instance in the history of the doctrine when the after-acquired evidence did not provide a legitimate reason for the employment decision. To the contrary, after-acquired evidence has, for instance, barred the claims of a plaintiff who misstated his citizenship status and was not legally author-

ized to work;²⁷ copied 3000 pages of confidential personnel records to which he had access as human resources director and gave them to his attorney;²⁸ failed to disclose a substance abuse problem in violation of DEA regulations governing his employer, a pharmaceutical company, for whom he manufactured controlled substances;²⁹ omitted information regarding discharge from a prior employer due to insubordination on an application for a police officer job;³⁰ lied about prior residences, prior employment, prior drug use, and prior mental health problems in applying for a security position;³¹ snuck into his supervisor's office, copied confidential management files, and showed them to a co-worker;³² and falsified more than 150 insurance records.³³ Under many employers' policies, the lie itself, rather than the underlying information it clothed, may be grounds for terminating the employment contract.³⁴

²⁷ *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247 (D. Utah 1993).

²⁸ *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992).

²⁹ *Bray v. Forest Pharmaceuticals, Inc.*, 812 F. Supp. 115 (S.D. Ohio 1993).

³⁰ *Carroll v. City of Chicago*, No. 87C 8995, 1990 WL 37631 (N.D. Ill. 1990).

³¹ *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515 (D. Kan. 1991).

³² *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992).

³³ *Summers*, 864 F.2d at 700.

³⁴ See, e.g., *Baab v. AMR Servs. Corp.*, 811 F. Supp. 1246 (N.D. Ohio 1993) (undisclosed prior injury not sufficient to bar claim where plaintiff was not discharged after a similar injury occurred, but the falsification itself was grounds for discharge where there was no proof that any other employee's lie had gone unpunished); *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992) (granting summary judgment on Title VII and ADEA claims where employee lied on his application regarding a prior felony conviction and, under the employer's policy, honesty per se was a requirement of employment); *Bonger*, 789 F. Supp. at 1102 (human resources

Moreover, to the extent that an employer relies upon such evidence at the summary judgment stage, it must establish its right to judgment under normally applicable principles. Although Petitioner and her amici repeatedly criticize the "self-serving" affidavits relied upon below, the lower courts regularly and routinely reject summary judgment motions based upon after-acquired evidence where such evidence does not warrant judgment for the employer. In *Malone v. Signal Processing Technologies, Inc.*, 826 F. Supp. 370, 375-76 (D. Colo. 1993), for instance, a district court bound by the Tenth Circuit's decision in *Summers* nonetheless refused to grant summary judgment where the employee did not admit to the alleged misconduct and she presented some evidence that the employer knew of the misconduct and would have rethired her anyway. Earlier, the same court denied an employer's motion for summary judgment based on after-acquired evidence of resume fraud where the plaintiff presented a factual issue as to whether the employer had asked for the plaintiff's prior tardiness record and as to whether a pardoned felony conviction would have been grounds for refusal to hire. *Punahale v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991). Likewise, in *Tuohey v. Clark Oil & Refining Corp.*, No. 92 C 8358, 1994 WL 280084 (W.D. Ill. 1994), the court refused to grant summary judgment where the employer's affidavit attesting to the fact that it would have fired the employee for omitting a prior felony conviction was rebutted by affidavits showing that the employer knew of the conviction and did not fire the plaintiff.

In each of these illustrative cases, and many others,³⁵ the plaintiff presented a triable issue regarding the after-

director's dishonesty regarding college degree was in itself grounds for discharge).

³⁵ E.g., *Welch v. Liberty Mach. Works*, 23 F.3d 1403, 1405-06 (8th Cir. 1994) (recognizing after-acquired evidence of employee misrepresentations as barring wrongful discharge claim, but denying summary judgment where a single employer affidavit did not carry the employee's burden of establishing an existing discharge

acquired evidence. Where this is so, under normal summary judgment rules, the case in question should go to trial.

Here, in contrast, Petitioner admitted that she copied and removed from the office sensitive personnel documents to which she had access only by virtue of her position as a confidential secretary to the Banner's comptroller. (J.A. at 117a-118a, 132a-133a, 150a.) She further admitted that maintaining the confidentiality of company records was an essential aspect of her job duties which, if abrogated, would lead to her discharge. (J.A. 154a.) Under the after-acquired evidence doctrine, therefore, the courts below correctly determined that a trial would serve no purpose and therefore granted summary judgment in favor of the Banner.

policy that is "more than mere contract or employment application boilerplate"); *Conlin v. Mission Foods Corp.*, 850 F. Supp. 856 (N.D. Cal. 1994) (rejecting the employer's after-acquired evidence defense where the employer failed to carry his burden of proving that the employee had fraudulently misrepresented his prior work experience); *DeVoe v. Medi-Dyn, Inc.*, 782 F. Supp. 546 (D. Kan. 1992) (refusing summary judgment on grounds of after-acquired evidence that employee had failed to disclose credit and child custody problems that impeded relocation where employee showed she was not in fact terminated after her employer became aware of her legal problems); *Rupley v. Rorer Pharmaceutical Corp.*, No. 90 C 5597, 1992 WL 37121 (N.D. Ill. 1992) (after-acquired evidence that employee claiming age discrimination had second job that sometimes interfered with his primary employment not sufficient grounds for summary judgment where court found genuine issue of material fact as to whether it was company policy to terminate employees based on outside employment and as to extent to which outside employment would be tolerated).

CONCLUSION

For the foregoing reasons, the amicus curiae respectfully urges this Court to affirm the Sixth Circuit's decision.

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September 8, 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTINE MCKENNON,
v. *Petitioner,*

NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**MOTION TO FILE BRIEF AS AMICI CURIAE AND
BRIEF AMICI CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL,
THE EMPLOYERS GROUP, THE MICHIGAN
MANUFACTURERS ASSOCIATION, THE NEWSPAPER
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IN SUPPORT OF RESPONDENT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1543

CHRISTINE MCKENNON,
v. *Petitioner,*

NASHVILLE BANNER PUBLISHING CO.,
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On Writ of Certiorari to the
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**MOTION OF THE EQUAL EMPLOYMENT ADVISORY
COUNCIL, THE EMPLOYERS GROUP, THE MICHIGAN
MANUFACTURERS ASSOCIATION, THE NEWSPAPER
ASSOCIATION OF AMERICA, AND THE NEWSPAPER
PERSONNEL RELATIONS ASSOCIATION
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

To the Honorable, the Chief Justice and the Associate
Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this
Court, the Equal Employment Advisory Council, The
Employers Group, the Michigan Manufacturers Associa-
tion, the Newspaper Association of America, and the
Newspaper Personnel Relations Association respectfully
move this Court for leave to file the accompanying brief
as *amici curiae* in support of the position of Respondent
in this case.

The written consent of Respondent Nashville Banner
Publishing Co. has been filed with the Clerk of the Court.
Although Respondent granted consent to five *amicus*

curiae briefs supporting Petitioner's position, Petitioner has not responded to our written request to file this brief.

In support of their motion, the *amici* by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. The five *amici* herein are associations representing private sector employers firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The Equal Employment Advisory Council (EEAC) is a voluntary association of nearly 300 private sector employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

3. The Employers Group, formerly known as the Merchants & Manufacturers Association, is the largest association of California employers, with over 5,000 employer members employing an aggregate of more than 2.5 million California employees.

4. The Michigan Manufacturers Association is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, to promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and to otherwise promote the general business and economic welfare of the State of Michigan.

5. The Newspaper Association of America is a non-profit corporation serving approximately 1,350 newspapers in the United States and Canada.

6. The Newspaper Personnel Relations Association (NPRA) is a non-profit professional association of approximately 370 human resource professionals representing the interests of more than 1,000 daily newspapers nationwide. NPRA is a professional emphasis group of the Society for Human Resource Management, which has a membership of more than 60,000 human resource professionals nationwide.

7. All of the *amici's* members, and the constituents of EEAC's association members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-related claims, the *amici's* members are interested in whether employees who falsify their credentials before being hired, or engage in active misconduct after being hired, should have their claims of employment discrimination dismissed at summary judgment or be able to recover any remedy.

8. Thus, the issue presented is extremely important to the nationwide constituencies that the *amici* represent. The Sixth Circuit below, applying the "after-acquired evidence doctrine," affirmed summary judgment in favor of Respondent because discovery revealed that Petitioner, a confidential secretary to the Banner's comptroller, had, without approval, copied, removed, and disseminated numerous confidential documents.

9. The *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. As employers, the constituent members that the *amici* represent have been or are likely to be involved in litigation where a claimant has been shown to have been engaged in misconduct that either would have resulted in the claimant's not being hired or in being discharged pursuant to established company policy. Numerous lower courts either have dismissed such suits

or have greatly limited the remedy available to the claimant. The legal and policy arguments supporting these decisions are set forth in the attached brief.

10. Indeed, because of their significant experience in these matters, the *amici* are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties. The *amici* also rely on this experience and expertise to respond to the arguments of several *amici* and the Solicitor General whose briefs support Petitioner, particularly their unsupported arguments that the after-acquired evidence doctrine will undercut the commitment of employers to eliminate unlawful workforce discrimination.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, The Employers Group, the Michigan Manufacturers Association, the Newspaper Association of America, and the Newspaper Personnel Relations Association respectfully request that the Court grant them leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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September 8, 1994

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE COURT SHOULD ADOPT A RULE, CONSISTENT WITH ITS DECISION IN <i>MT. HEALTHY SCHOOL DISTRICT BOARD OF EDUCATION v. DOYLE</i> , THAT BECAUSE EVEN A SUCCESSFUL DISCRIMINATION CLAIMANT MAY NOT BE PLACED IN A BETTER POSITION THAN IF THE DISCRIMINATION HAD NOT OCCURRED, AN EMPLOYEE WHO WOULD HAVE BEEN DISCHARGED FOR REASONS OTHER THAN A DISCRIMINATORY REASON IS NOT ENTITLED TO A REMEDY, EVEN THOUGH THE ALTERNATIVE REASON CAME TO LIGHT AFTER THE ALLEGED DISCRIMINATORY DECISION. THE SUMMARY JUDGMENT RENDERED BELOW SHOULD BE AFFIRMED	8
A. Even a Successful Discrimination Claimant May Not Properly Be Placed in a Better Position Than If the Discrimination Had Not Occurred	9
B. The <i>Mt. Healthy</i> Principle Is Applicable Even Though the Outcome Depends Upon After-Acquired Evidence	11
II. AFTER-ACQUIRED EVIDENCE THAT WOULD HAVE LED TO A CLAIMANT'S DISCHARGE IN ANY EVENT BARS ANY RECOVERY	17

TABLE OF CONTENTS—Continued

	Page
A. Applicability of the After-Acquired Evidence Doctrine Is Strictly Limited to Cases in Which the Employer Can Show That It Would Have Taken Justifiable Adverse Action Had It Known of the Misconduct	17
B. The After-Acquired Evidence Doctrine Is Consistent With the Court's Recent Decision in <i>ABF Freight System</i>	21
C. The Equal Employment Opportunity Commission Also Has Espoused the Doctrine, But Then Reversed Its Position	24
D. Public Policy Supports Application of the After-Acquired Evidence Doctrine as a Bar To All Remedies	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page
<i>ABF Freight System v. National Labor Relations Board</i> , 114 S. Ct. 835 (1994)	21-24
<i>Agbor v. Mountain Fuel Supp. Co.</i> , 810 F. Supp. 1247 (D. Utah 1993)	14
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	20
<i>Anderson v. Martin Brower Co.</i> , No. 93-2333-JWL, 1994 U.S. Dist. LEXIS 9196 (D. Kan. 1994)	19
<i>Astoria Federal Savings & Loan Association v. Solimino</i> , 501 U.S. 104 (1991)	2
<i>Baab v. AMR Services Corp.</i> , 811 F. Supp. 1246 (N.D. Ohio 1993)	28
<i>Benitez v. Portland General Electric</i> , 58 Fair Empl. Prac. Cas. (BNA) 1130 (D. Or. 1992)	15
<i>Benson v. Quanex Corp.</i> , 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992)	14
<i>Bonger v. American Water Works</i> , 789 F. Supp. 1102 (D. Colo. 1992)	13
<i>Chrysler Corporation, et al. v. Smolarek, et al.</i> , 879 F.2d 1326 (6th Cir.), cert. denied, 493 U.S. 992 (1989)	3
<i>Churchman v. Pinkerton's</i> , 756 F. Supp. 515 (D. Kan. 1991)	14
<i>Equal Employment Opportunity Commission v. Farmer Brothers Company</i> , Nos. 92-56012, 92-56123, 1994 U.S. App. LEXIS 19788 (9th Cir. 1994)	16
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976)	26
<i>General Motors Corporation v. Romein and Ford Motor Company v. Gonzales</i> , 112 S. Ct. 1105 (1992)	3
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	2
<i>Grzenia v. Interspec</i> , No. 91 C 20, 1991 U.S. Dist. LEXIS 15093 (N.D. Ill. Oct. 21, 1991)	14
<i>Hazen Paper Co. v. Biggins</i> , 113 S. Ct. 1701 (1993)	2

TABLE OF AUTHORITIES—Continued

	Page
<i>Hoffmann-La Roche, Inc. v. Sperling</i> , 493 U.S. 165..	2
<i>Johnson v. Honeywell Information Systems, Inc.</i> , 955 F.2d 409 (6th Cir. 1992)	7, 8, 13, 16, 18
<i>Kravit v. Delta Airlines</i> , 60 Fair Empl. Prac. Cas. (BNA) 994 (E.D.N.Y. 1992)	14
<i>Kristufek v. Hussmann Foodservice Co.</i> , 985 F.2d 364 (7th Cir. 1993)	16, 18, 23
<i>Livingston v. Sorg Printing Co.</i> , 49 Fair Empl. Prac. Cas. (BNA) 1417 (S.D.N.Y. 1989)	15
<i>Mardell v. Harleysville Life Insurance Company</i> , No. 93-3258, 1994 U.S. App. LEXIS 19884 (3d Cir. 1994)	14, 16, 17
<i>Massey v. Trump's Castle Hotel & Casino</i> , 828 F. Supp. 314 (D.N.J. 1993)	15
<i>Mathis v. Boeing Military Airplane Co.</i> , 719 F. Supp. 991 (D. Kan. 1989)	25
<i>Miera v. National Labor Relations Board</i> , 982 F.2d 441 (10th Cir. 1992), <i>aff'd sub nom. ABF Freight System v. National Labor Relations Board</i> , 114 S. Ct. 835 (1994)	22
<i>Milligan-Jensen v. Michigan Technological Uni- versity</i> , 975 F.2d 302 (6th Cir. 1992), <i>cert. dis- missed</i> , 114 S. Ct. 22 (1993)	6, 7, 13
<i>Moodie v. Federal Reserve Bank of New York</i> , 831 F. Supp. 333 (S.D.N.Y. 1993)	15
<i>Mt. Healthy Sch. District Board of Education v. Doyle</i> , 429 U.S. 274 (1977)	7-12, 14, 16
<i>Newport News Shipbuilding and Dry Dock Co.</i> , 674 F.2d 248 (4th Cir. 1982)	20
<i>O'Day v. McDonnell Douglas Helicopter Co.</i> , 784 F. Supp. 1466 (D. Ariz. 1992), <i>appeal docketed</i> , No. 92-15625 (9th Cir.)	13, 16
<i>O'Driscoll v. Hercules, Inc.</i> , 12 F.3d 176 (10th Cir. 1994), <i>petition for cert. filed</i> , 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728)	6, 13, 18
<i>O'Driscoll v. Hercules, Inc.</i> , 745 F. Supp. 656 (D. Utah 1990, <i>aff'd</i> , 12 F.3d 176 (10th Cir. 1994), <i>petition for cert. filed</i> , 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728)	20

TABLE OF AUTHORITIES—Continued

	Page
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) ..	12, 15-17
<i>Public Employees Ret. System of Ohio v. Betts</i> , 492 U.S. 158 (1989)	2
<i>Punahale v. United Air Lines</i> , 756 F. Supp. 487 (D. Colo. 1991)	16, 19
<i>Redd v. Fisher Controls</i> , No. 92-8702 (5th Cir. August 29, 1994)	2
<i>Rich v. Westland Printers</i> , 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993)	14
<i>Ruggles v. California Polytechnic State University</i> , 797 F.2d 782 (9th Cir. 1986)	7, 10
<i>Russell v. Microdyne Corp.</i> , 830 F. Supp. 305 (E.D. Va. 1993), <i>appeal docketed</i> , Nos. 93-1895 and 93-2078 (4th Cir.)	14
<i>Smallwood v. United Air Lines, Inc.</i> , 661 F.2d 303 (4th Cir. 1981)	11
<i>Smallwood v. United Air Lines, Inc.</i> , 728 F.2d 614 (4th Cir.), <i>cert. denied</i> , 469 U.S. 832 (1984) ..	6, 7, 11-12
<i>Still v. Norfolk & Western Railway Co.</i> , 368 U.S. 35 (1961)	20
<i>Summers v. State Farm Mutual Automobile Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	6-8, 13-15, 25-26
<i>Sweeney v. U-Haul Co. of Chicago</i> , 55 Fair Empl. Prac. Cas. (BNA) 1257 (N.D. Ill. 1991)	15
<i>Trans World Airlines, Inc. v. Thurston</i> , 469 U.S. 111 (1985)	2
<i>Tuohey v. Clark Oil & Refining Corp.</i> , No. 92 C 8358, 194 U.S. Dist. LEXIS 8102 (N.D. Ill. 1994)	19
<i>Wallace v. Dunn Construction Co., Inc.</i> , 968 F.2d 1174 (11th Cir. 1992)	6, 14, 16-17
<i>Washington v. Lake County, Illinois</i> , 969 F.2d 250 (7th Cir. 1992)	6-7, 13, 19, 20
<i>Welch v. Liberty Machine Works</i> , 23 F.3d 1403 (8th Cir. 1994)	13, 19

TABLE OF AUTHORITIES—Continued

DOCKETED CASES	Page
<i>Manard v. Fort Howard Corp.</i> , No. 92-7100 (10th Cir.)	3
<i>O'Day v. McDonnell Douglas Helicopter Co.</i> , No. 92-15625 (9th Cir.)	3
<i>Russell v. Microdyne Corporation</i> , Nos. 93-1895 and 93-2078 (4th Cir.)	3
<i>Schnidrig v. Columbia Machine, Inc.</i> , No. 93-35770 (9th Cir.)	3
 STATUTES	
Age Discrimination in Employment Act, 29 U.S.C. § 621 <i>et seq.</i>	4, 5, 9
Americans with Disabilities Act, 29 U.S.C. § 12101 <i>et seq.</i>	9
Federal Employers' Liability Act, 45 U.S.C. § 51.....	20
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 904	20
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e <i>et seq.</i>	9, 16, 18, 20, 24, 26, 27
42 U.S.C. § 2000e-2(a)	9
 MISCELLANEOUS	
- <i>Policy Guidance on Recent Developments in Disparate Treatment Theory</i> , N-915.063, EEOC Compl. Man. (BNA) N:2119 (Equal Employment Opportunity Commission, 1991)	25-26
<i>Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory</i> , N-914.002, EEOC Compl. Man. (BNA) N:2135 (Equal Employment Opportunity Commission, 1992)	24, 26

IN THE
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OCTOBER TERM, 1994

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CHRISTINE MCKENNON,
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Respondent.

 On Writ of Certiorari to the
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**BRIEF AMICI CURIAE OF THE
 EQUAL EMPLOYMENT ADVISORY COUNCIL,
 THE EMPLOYERS GROUP, THE MICHIGAN
 MANUFACTURERS ASSOCIATION, THE NEWSPAPER
 ASSOCIATION OF AMERICA, AND THE NEWSPAPER
 PERSONNEL RELATIONS ASSOCIATION
 IN SUPPORT OF RESPONDENT**

 The Equal Employment Advisory Council, The Employers Group, the Michigan Manufacturers Association, the Newspaper Association of America and the Newspaper Personnel Relations Association respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave. The brief urges the Court to affirm the decision below, and thus supports the position of Respondent Nashville Banner Publishing Company before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 290 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 350 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in numerous cases before this Court involving the proper interpretation of the ADEA.¹ In addition, EEAC has filed briefs in several cases before the Courts of Appeals involving the after-acquired evidence doctrine.²

¹ *E.g.*, *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (standard of proof for recovery of liquidated damages); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrability); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 101 (1991) (effect of state agency "no cause" finding); *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (application to employee benefits); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989) (class actions); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (standard for liquidated damages).

² In addition to filing a brief before the Sixth Circuit below in the instant case, EEAC has filed briefs in *Redd v. Fisher Controls*, No. 92-8702 (5th Cir. August 29, 1994) (issue not reached);

The Employers Group, formerly known as the Merchants & Manufacturers Association, is the largest association of California employers, with over 5,000 employer members employing an aggregate of more than 2.5 million California employees.

The Michigan Manufacturers Association (MMA) is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, to promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and to otherwise promote the general business and economic welfare of the State of Michigan. A significant aspect of MMA's activities is representing the interests of its member-employers in employment and labor relations matters before the courts, Congress, Michigan Legislature and state agencies.³ MMA appears before this Court as a representative of more than 2,900 private business concerns employing over one million employees, many of whom are substantially affected by the issues in the case presently before the Court. MMA represents the interests of its members through various means, including through appearances as *amicus curiae* in cases of great concern. MMA also is an employer and has an interest in this case

Manard v. Fort Howard Corp., No. 92-7100 (10th Cir.) (decision pending); *O'Day v. McDonnell Douglas Helicopter Co.*, No. 92-15625 (9th Cir.) (decision pending); *Russell v. Microdyne Corporation*, Nos. 93-1895 and 93-2078 (4th Cir.) (decision pending); and *Schnidrig v. Columbia Machine, Inc.*, No. 93-35770 (9th Cir.) (decision pending).

³ MMA has filed briefs with this Court in *Chrysler Corporation, et al. v. Smolarek, et al.*, 879 F.2d 1326 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) (whether § 301 of the Labor Management Relations Act preempted claims under Michigan's Handicappers' Civil Rights Act) and *General Motors Corporation v. Romein and Ford Motor Company v. Gonzales*, 112 S. Ct. 1105 (1992) (retroactive application of an amendment to the Workers' Disability Compensation Act in Michigan).

both as an employer and as a representative of employers affected by these issues.

The Newspaper Association of America is a non-profit corporation serving approximately 1,350 newspapers in the United States and Canada. The majority of these members are daily newspapers that account for more than 85 percent of the daily circulation in the United States. Many non-daily newspapers also are members of NAA®.

The Newspaper Personnel Relations Association is a non-profit professional association of approximately 370 human resource professionals representing the interests of more than 1,000 daily newspapers nationwide and is a professional emphasis group of the Society for Human Resource Management, with a membership of more than 60,000 human resource professionals nationwide.

All of the *amici*'s members, and the constituents of EEAC's association members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-related claims, the *amici*'s members are interested in whether employees who engage in active misconduct can recover on such claims.

Thus, the issue presented is extremely important to the nationwide constituencies that the *amici* represent. Mrs. McKennon claims that Nashville Banner Publishing Company ("the Banner") discharged her because of her age in violation of the ADEA. The district court granted summary judgment in favor of the Banner, because discovery revealed that Mrs. McKennon, a confidential secretary to the Banner's comptroller, had, without approval, copied, removed and disseminated numerous confidential documents. The Sixth Circuit affirmed. Unrebutted evidence showed that Mrs. McKennon would have been fired for her misconduct had the Banner known of it before

her termination. The courts below ruled correctly that the after-acquired evidence against Mrs. McKennon precluded any recovery on her discrimination claim.

Thus, the *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their significant experience in these matters, the *amici* are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The Nashville Banner Publishing Company ("the Banner") employed Christine McKennon primarily as a secretary. Pet. App. 2a.⁴ Beginning in 1989, Mrs. McKennon was a confidential secretary to the Comptroller, where she was privy to numerous confidential matters, including personnel and financial files and documents. Pet. App. 11a. Mrs. McKennon's employment was terminated in 1990, according to the Banner, as part of a workforce reduction. *Id.* Mrs. McKennon, then age 62, filed suit against the Banner under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and a similar state statute, claiming that her termination was because of her age. *Id.*

During discovery in the case, the Banner learned that, during her tenure as the Comptroller's secretary, Mrs. McKennon had copied and removed numerous confidential documents, including a payroll ledger, a current profit and loss statement, and several notes and memoranda. *Id.* She had taken the documents home and shown them to

⁴ The decision of the Sixth Circuit below is reported at 9 F.3d 539, and is reproduced at pages 1a-9a of the Appendix to the Petition for a Writ of Certiorari as Pet. App. 1a-9a. The decision of the U.S. District Court for the Middle District of Tennessee, Nashville Division, is reported at 797 F. Supp. 604, and is reproduced at pages 10a-18a of the Appendix. They are cited herein as Pet. App. —.

her husband. *Id.* Mrs. McKennon contends that "she copied and removed the documents for her 'insurance' and 'protection,' 'in an attempt to learn information regarding my job security concerns.'" Pet. App. 12a.

The district court found that "Mrs. McKennon's copying and removal of the confidential documents constituted misconduct, which was in violation of her obligations as a confidential secretary." Pet. App. 13a. Undisputed evidence, an affidavit from the Banner's president, shows that Mrs. McKennon would have been terminated immediately had the Banner learned of her misconduct prior to her discharge. Pet. App. 2a-3a.

The "after-acquired evidence doctrine," adopted by the Sixth, Seventh, and Tenth Circuit Courts of Appeals, bars, in appropriate cases, recovery by a discrimination claimant who engages in conduct that would have resulted in dismissal. *Milligan-Jensen v. Michigan Technological University*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Washington v. Lake County, Illinois*, 969 F.2d 250 (7th Cir. 1992); *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728); *Summers v. State Farm Mut. Auto Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).⁵ The district court granted the Banner's motion for summary judgment based on the after-acquired evidence doctrine, Pet. App. 18a, and the Sixth Circuit affirmed. Pet. App. 9a. This Court has granted McKennon's petition for a writ of certiorari to the Sixth Circuit.

⁵ See also *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984) (disqualification for employment and thus for backpay can be established by after-acquired evidence). But see *Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) (holding that after-acquired evidence is relevant to the relief due a successful discrimination plaintiff although declining to impose an absolute bar).

SUMMARY OF ARGUMENT

Where an employer shows that a discrimination plaintiff would have been terminated for on-the-job misconduct, there can be no recovery on the discrimination claim, even though the evidence of misconduct was acquired after the alleged discriminatory act. A discrimination claimant is not entitled to be placed in a better position than if the discrimination had not occurred. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977); *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). Thus, where the claimant would have been discharged regardless of whether or not discriminatory conduct occurred, the claimant is not entitled to a remedy, and summary judgment is appropriate.

The *Mt. Healthy* analysis applies even though the information that would have led to termination was acquired by the employer after the alleged discrimination took place. *Smallwood v. United Air Lines*, 728 F.2d 614, 623 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984). Accordingly, if an employer can show that an employee would have been fired had the employer known of his on-the-job misconduct, the employee cannot recover on a discrimination claim, and summary judgment is appropriate. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Milligan-Jensen v. Michigan Tech.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992). Any other result, such as awarding backpay for a period of time before the wrongdoing was discovered, would only reward the plaintiff for successfully concealing the misconduct from the employer.

The arguments advanced by the Solicitor General should be given no deference and should not be adopted by this Court. The government has been inconsistent; it previously *embraced* the after-acquired evidence doctrine

as barring all remedies in appropriate cases. Also, the policy advocated by the agency in effect rewards those who successfully conceal their misconduct.

ARGUMENT

I. THE COURT SHOULD ADOPT A RULE, CONSISTENT WITH ITS DECISION IN *MT. HEALTHY SCHOOL DISTRICT BOARD OF EDUCATION v. DOYLE*, THAT BECAUSE EVEN A SUCCESSFUL DISCRIMINATION CLAIMANT MAY NOT BE PLACED IN A BETTER POSITION THAN IF THE DISCRIMINATION HAD NOT OCCURRED, AN EMPLOYEE WHO WOULD HAVE BEEN DISCHARGED FOR REASONS OTHER THAN A DISCRIMINATORY REASON IS NOT ENTITLED TO A REMEDY, EVEN THOUGH THE ALTERNATIVE REASON CAME TO LIGHT AFTER THE ALLEGED DISCRIMINATORY DECISION. THE SUMMARY JUDGMENT RENDERED BELOW SHOULD BE AFFIRMED.

As shown below, the Sixth Circuit correctly granted summary judgment because the un rebutted evidence that the Banner would have terminated Mrs. McKennon had it known of her misconduct compelled judgment in favor of the Banner on Mrs. McKennon's discrimination claim. Applying its prior decision in *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992), which relied on *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), which in turn relied on this Court's decision in *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the Sixth Circuit reached the correct result—that because she would have been fired had the Banner known of her theft and dissemination of sensitive company documents, Mrs. McKennon takes nothing on her discrimination claim. This Court's clear precedent requires affirmance of the decision below.

A. Even a Successful Discrimination Claimant May Not Properly Be Placed in a Better Position Than If the Discrimination Had Not Occurred.

No matter what the employment action in question, the ultimate aim of an employment discrimination remedy under either Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination in employment on the basis of race, sex, color, religion or national origin,⁶ the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, or the Americans with Disabilities Act, 29 U.S.C. § 12101 *et seq.*, is to place the plaintiff in the position he or she would have been in had the employer not engaged in any discriminatory conduct. Therefore, where the employer can show that it would have taken the same action, even in the absence of any discrimination, no remedies are available and summary judgment is appropriate.

This Court's *Mt. Healthy* decision established the framework for this result. In *Mt. Healthy*, a school district refused to renew a teacher's contract because he had told a local radio station about a new teacher dress code and because of an incident in which he had made obscene gestures. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282-83 (1977). The lower court concluded that the statement to the radio station was protected by the First and Fourteenth Amendments and ordered reinstatement and backpay. This Court reversed, holding that even if the protected conduct played a "substantial part" in the board's decision, the teacher still may not be entitled to a remedy. *Id.* at 285. As the Court explained:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he

⁶ 42 U.S.C. § 2000e-2(a).

would have occupied had he done nothing The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But, that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 285-86. In so holding, the Court established the general principle, applicable in several contexts, that if the outcome would have been the same regardless of presence or absence of discriminatory conduct, the plaintiff needs no remedial action to place him in the position he would have been in had no discriminatory conduct occurred.

The *Mt. Healthy* principle is equally applicable to employment discrimination cases. *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). "Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise." *Id.* (citing *Mt. Healthy*, 429 U.S. at 285-87). Accordingly, even if a plaintiff has succeeded in raising a presumption that an adverse employment action was taken for a discriminatory reason, "[t]he defendant may rebut this presumption by showing by a preponderance of the evidence that the adverse action would have been taken even in the absence of discriminatory or retaliatory intent." *Id.* (citing *Mt. Healthy*, 429 U.S. at 287).

B. The *Mt. Healthy* Principle Is Applicable Even Though the Outcome Depends Upon After-acquired Evidence.

In *Smallwood v. United Air Lines*, 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984), the Fourth Circuit clarified that the *Mt. Healthy* analysis applies whether or not the information that would have led to the same result was actually in the employer's possession at the time of the alleged discriminatory action. *Smallwood* involved a pilot who was rejected for employment because he was 48 years of age when the company only processed applications of those 35 and under. Although the Fourth Circuit rejected United's defense that age was a *bona fide* occupational qualification,⁷ it concluded that United would not have hired Smallwood even absent age discrimination, and thus dismissed Smallwood's claim for processing of his application and for backpay. *Smallwood*, 728 F.2d at 627.

The evidence that would have led United not to hire Smallwood was not in United's possession at the time it rejected his application. United learned later that Smallwood had been terminated by his previous employer for serious misconduct. *Id.* at 621-22.⁸ The district court, however, had given this after-acquired evidence short shrift, expressing doubt that it was admissible at all and finding a "duty . . . to view it with skepticism." *Id.* at 623.

Criticizing the district court's dismissal of the after-acquired evidence as "a reason that is completely contrary to the bellwether case in this area of *Mt. Healthy*," *id.*, the Fourth Circuit concluded that "[i]n short, the Supreme

⁷ *Smallwood v. United Air Lines*, 661 F.2d 303 (4th Cir. 1981).

⁸ The report of the Referee in Smallwood's discharge proceeding indicated that he had (1) provided false information to collect moving expenses to which he was not actually entitled and (2) impermissibly charged airfare for his children to his company credit card. 728 F.2d at 620-22.

Court instructed district courts in cases where the issue is such as here that they 'should' proceed to make the 'after-the-fact rationale' which the district court in this case deprecates." *Id.* (emphasis in original). Accordingly, the court ruled:

the disqualification for employment and thus for back-pay, based on a "recreating [of] the circumstances that would have existed but for the illegal discrimination" may be established by evidence which had not been developed at the time the claimant was denied employment

Id. at 624 (quoting *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982)). Based on United's un rebutted evidence that it would not have hired Smallwood had it known the truth, the Fourth Circuit dismissed the case. *Id.* at 627.⁹ Accordingly, using after-acquired evidence to reconstruct the situation is consistent with *Mt. Healthy's* mandate that the plaintiff be placed in no better position than if the alleged unlawful action had not occurred. "[T]here is nothing unusual in a court resolving what a party to litigation would or should have done under certain circumstances. It is done repeatedly in tort cases." *Smallwood*, 728 F.2d at 623.

Based on this reasoning, several Courts of Appeals have concluded that after-acquired evidence of on-the-job misconduct bars all relief under the anti-discrimination statutes. The "after-acquired evidence doctrine," as it is now known, first took shape in a case factually similar to this, wherein the Tenth Circuit in 1988 applied *Mt. Healthy* and *Smallwood* to conclude that after-acquired evidence of

⁹ The Solicitor General incorrectly argues that the employer's burden of proof in these cases is governed by the "clear and convincing evidence" standard. Brief of Solicitor General at 24 and n.16. This Court has rejected the use of that standard for most civil litigation and made clear that "preponderance of the evidence" is the appropriate test. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-255 (1989).

on-the-job misconduct that would have led to the plaintiff's termination bars any relief. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).

Summers, who was terminated from his position for falsifying records and poor performance, charged that he was fired because of his age and religion. *Id.* at 702. Summers had been warned repeatedly that falsification of documents would result in discharge. During trial preparation in the case, State Farm learned that Summers had falsified records in numerous other instances. *Id.* at 703. The court ruled that "while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief or remedy to Summers." *Id.* at 708. Numerous district courts also have denied relief based on after-acquired evidence of on-the job misconduct.¹⁰

The after-acquired evidence doctrine similarly has been adopted for use in cases involving "résumé fraud," where the plaintiff has made a material misstatement or omission on his or her job application documents. See, e.g., *Welch v. Liberty Machine Works*, 23 F.3d 1403 (8th Cir. 1994) (adopting doctrine but concluding that employer had not sufficiently established that it would not have hired the employee had it known of the misrepresentation); *O'Driscoll v. Hercules*, 12 F.3d 176 (10th Cir. 1994), petition for cert. filed, 62 U.S.L.W. 3757 (U.S. April 4, 1994) (No. 93-1728); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), cert. dismissed, 114 S. Ct. 22 (1993); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) (framing issue as whether the plaintiff

¹⁰ See, e.g., *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992), appeal docketed, No. 92-15625 (9th Cir.); *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992).

would have been fired, not whether he would have been hired, had the employer known of the falsification).¹¹ Numerous district courts also have denied relief based on *Summers* where the plaintiff provided false information in the application process.¹²

¹¹ Panels of the Third and Eleventh Circuits have taken a different approach to application of the *Mt. Healthy* doctrine in a termination case where the after-acquired evidence was of falsified information on the employment application. *Mardell v. Harleysville Life Insurance Company*, No. 93-3258, 1994 U.S. App. LEXIS 19884 (3d Cir. 1994); *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992). Both of these courts agreed with *Summers* that after-acquired evidence may be relevant to the remedies due the plaintiff in a discrimination case. Nevertheless, they declined to hold that the plaintiffs were entitled to *no* remedy, concluding instead that a plaintiff should receive backpay where the employer would never have discovered the plaintiff's application fraud had it not surfaced in the litigation. *Id.*

As discussed below, this approach rewards a plaintiff who successfully conceals fraud or misconduct, and indeed encourages attempts to keep such conduct secret. As the dissenting judge in *Wallace* pointed out, it enables the plaintiff to "take advantage of her own misdeeds and convert her spurious statements into a shield against the employer." *Id.* at 1189 (Godbold, J., dissenting). For this reason, we believe that the Fourth, Sixth, Seventh, Eighth and Tenth Circuits' approach is the better one.

¹² See, e.g., *Agbor v. Mountain Fuel Supp. Co.*, 810 F. Supp. 1247 (D. Utah 1993) (denying any remedy in case alleging discriminatory denial of promotion); *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993) (no relief in case alleging discriminatory layoff, promotion and training); *Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D. Va. 1993) (denying any remedy in case alleging sex discrimination, sexual harassment and retaliation), appeal docketed, Nos. 93-1895 and 93-2078 (4th Cir.); *Kravit v. Delta Airlines*, 60 Fair Empl. Prac. Cas. (BNA) 994 (E.D.N.Y. 1992) (no state law remedy available for rejected applicant who falsified application); *Benson v. Qualex Corp.*, 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992) (granting summary judgment in race discrimination and harassment case); *Grzenia v. Interspec*, No. 91 C 20, 1991 U.S. Dist. LEXIS 15093 (N.D. Ill. Oct. 21, 1991) (granting summary judgment in ADEA case); *Churchman v. Pinkerton's*, 756 F. Supp. 515 (D. Kan. 1991)

The decision by a plurality of this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), does not preclude the use of after-acquired evidence. The Solicitor General's brief argues that the plurality opinion in *Price Waterhouse* imparted a temporal qualification to mixed motive cases, stating that "An employer may not . . . prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." 490 U.S. at 252. But *Price Waterhouse* did not involve discovery of earlier misdeeds by the plaintiff that would have justified her discharge if known to the employer had those misdeeds not been concealed by the plaintiff.

The after-acquired evidence doctrine does not, moreover, involve a mixed motive analysis, nor does it affect a finding of liability. On the contrary, the after-acquired evidence doctrine *assumes* liability on the part of the employer, but recognizes that evidence discovered later affects the remedies due to the employee if the employee's misconduct was sufficiently serious that the employee would not have been hired, or would have been discharged, had this misconduct been known by the employer. See *Summers*, 864 F.2d at 708 ("[W]hile such after-acquired evidence cannot be said to have been a

(granting summary judgment where plaintiff claimed constructive discharge as a result of sexual harassment); *Sweeney v. U-Haul Co. of Chicago*, 55 Fair Empl. Prac. Cas. (BNA) 1257 (N.D. Ill. 1991) (granting summary judgment in race discrimination case); *Livingston v. Sorg Printing Co.*, 49 Fair Empl. Prac. Cas. (BNA) 1417 (S.D.N.Y. 1989) (granting summary judgment against race discrimination claimant). But see *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993) (adopting Eleventh Circuit rule and allowing retroactive but not prospective relief); *Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333 (S.D.N.Y. 1993) (denying summary judgment due to genuine issues of material fact); *Benitez v. Portland Gen. Electric*, 58 Fair Empl. Prac. Cas. (BNA) 1130 (D. Or. 1992) (refusing to follow *Summers* at summary judgment stage due to lack of Ninth Circuit precedent).

'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief to Summers."). Where an employee would have been terminated had the employer known the truth, application of the *Mt. Healthy* principle requires that the employee be placed in *no better* position as a result of having brought a discrimination claim.¹³

Even if the *Price Waterhouse* rationale were applicable, however, it would not help Petitioner. The decision was a "mixed motive" case that dealt with the issue of liability, holding that "once a plaintiff in a Title VII case shows that [a protected characteristic] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the protected characteristic] to play such a role." *Id.* at 244-45. The after-acquired evidence doctrine deals with whether a plaintiff who is shown to have committed an offense that would have resulted in not being hired or in being terminated can recover any remedy. See *O'Day*, 784 F. Supp. at 1469 (D. Ariz. 1992) (distinguishing *Price Waterhouse*); *Punahale v. United Air Lines*, 756 F. Supp. 487, 490 (D. Colo. 1991) (same).

In either situation, the case should be dismissed if the employer can prove it had a legitimate reason for discharging the plaintiff. Where, as here, the plaintiff has

¹³ Indeed, even those courts that reject *Summers* agree that while after-acquired evidence has no bearing on liability, it can be relied upon to limit the available remedies. See *Wallace v. Dunn Construction Company, Inc.*, 968 F.2d 1174, 1181 (11th Cir. 1992); *Mardell v. Harleysville Life Insurance Company*, No. 93-3258, 1994 U.S. App. LEXIS 19884, *54-*55 (3d Cir. 1994); *Equal Employment Opportunity Commission v. Farmer Brothers Company*, Nos. 92-56012, 92-56123, 1994 U.S. App. LEXIS 19788, *27-*28 (9th Cir. 1994) (dicta).

engaged in misconduct that legitimately justifies termination, *Price Waterhouse* would support a decision to dismiss the case.

We urge, therefore, that this Court confirm the after-acquired evidence doctrine as applied by the Fourth, Sixth, Seventh, Eighth and Tenth Circuits.

II. AFTER-ACQUIRED EVIDENCE THAT WOULD HAVE LED TO A CLAIMANT'S DISCHARGE IN ANY EVENT BARS ANY RECOVERY.

Petitioner and the Solicitor General concede that after-acquired evidence of on-the-job misconduct may limit the relief available to the plaintiff in a discrimination case. Brief of Petitioner at 30; Brief of Solicitor General at 10. The narrow issue presented in this case, therefore, is whether after-acquired evidence of misconduct can bar *all* remedies, as found by the Sixth Circuit below as well as the Fourth, Seventh, Eighth and Tenth Circuits, or whether it merely limits available remedies, as concluded by the Eleventh Circuit in *Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) and the Third Circuit in *Mardell v. Harleysville Life Insurance Company*, No. 93-3258, 1994 U.S. App. LEXIS 19884 (3d Cir. 1994).

A. Applicability of the After-Acquired Evidence Doctrine Is Strictly Limited to Cases in Which the Employer Can Show That It Would Have Taken Justifiable Adverse Action Had It Known of the Misconduct.

The *amici* herein take special exception to the unsupported assertion of the Solicitor General that employers will eschew compliance with the law and instead rely on "the after-acquired evidence defense as an invitation 'to establish ludicrously low thresholds for legitimate termination.'" Br. at 17 (quoting *Wallace*, 968 F.2d at

1180). The Solicitor General broadly, yet incorrectly, asserts that "[e]mployers now routinely embark on extensive, post-discharge investigations designed to uncover some theoretically valid post hoc justification for terminating an employee who has brought a claim of unlawful discrimination, instead of conducting the self-examination and correction of unlawful practices that Title VII and the ADEA are designed to require." Br. at 18. This attack unfairly characterizes the approach taken by the circuits that have adopted the doctrine.

These circuits have established exacting standards that must be met by the employer's reason and its proof before the doctrine is deemed to apply in a particular case. After-acquired evidence will not bar recovery unless the employer can show that it indeed would have fired the employee had it known of the misconduct earlier. The Tenth Circuit has articulated the employer's burden of proof as requiring a showing that "(1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct." *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176, 179 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728). The Sixth Circuit below specifically held that the doctrine applies "where the employer can show it would have fired the employee on the basis of the evidence." Pet. App. 6a. In a prior case involving resume fraud, the Sixth Circuit noted explicitly that "[b]ecause [the employer] established that it would not have hired [the plaintiff] and that it would have fired her had it become aware of her resume fraud during her employment, [the plaintiff] is entitled to no relief." *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 415 (6th Cir. 1992).

Other circuits applying the doctrine are similarly strict. In *Kristufek v. Hussman Foodservice Co.*, 985 F.2d

364, (7th Cir. 1993), the Seventh Circuit concluded that the doctrine did not apply because the employer was *unable* to show that it would have terminated the plaintiff's employment had it known of his falsified application information. *Id.* at 370.¹⁴ See also *Washington v. Lake County, Illinois*, 969 F.2d 250 (7th Cir. 1992) (holding that in a "résumé fraud" case, it is insufficient for an employer to show that the employee would not have been hired, and specifically requiring a showing that the employee would have been fired had the falsification come to light during his employment). Similarly, the Eighth Circuit recently adopted the doctrine in *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994), but declined to apply it, concluding that the employer's proof was insufficient.

Based on these standards, district courts facing this issue *are* holding employers to strict proof that the after-acquired evidence indeed would have resulted in discharge. See, e.g., *Tuohey v. Clark Oil & Refining Corp.*, No. 92 C 8358, 194 U.S. Dist. LEXIS 8102 (N.D. Ill. 1994) (denying summary judgment because employer merely showed that it could have, not that it would have, fired the plaintiff had it known of misstatements on his employment application); *Anderson v. Martin Brower Co.*, No. 93-2333-JWL, 1994 U.S. Dist. LEXIS 9196 (D. Kan. 1994) (denying summary judgment because employer failed to present evidence allowing the court to determine that employee engaged in misconduct under company policy); *Punahale v. United Air Lines, Inc.*, 756 F. Supp. 487 (D. Colo. 1991) (denying summary judgment because material fact remained as to whether employer followed its own procedures or would not have hired plaintiff).

¹⁴ Even in this situation, however, the Seventh Circuit reduced the award of backpay to eliminate any recovery for the period after the falsification was discovered. *Id.* at 371.

As one district court has noted, under *Summers* and its progeny, "[a]n employer must show that misconduct was such that an employee would have been terminated had the employer known of the misconduct before or at the time of termination. *This requirement prevents an employer from combing an employee's file after a discriminatory termination to discover minor, trivial or technical infractions for use in a Summers defense.*" *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659 (D. Utah 1990) (emphasis added) (quoted with approval in *Washington v. Lake County, Ill.*, 969 F.2d 250, 255-56 (7th Cir. 1992)), *aff'd* 12 F.3d 176 (10th Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. April 1, 1994) (No. 93-1728)).¹⁵

Accordingly, because of this rigorous standard of proof, the Solicitor General's fear that employers will manufacture minimal standards for discharge is unfounded. Moreover, no employer realistically could expect to run an efficient workforce while routinely terminating employees for ridiculous reasons. An employer who discharged

¹⁵ These standards provide "principled application of standards consistent with . . . [legislative] purposes" (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)) so as to justify a denial of remedy and dismissal of this case. Contrary to the arguments of the Petitioner, the Solicitor General and several supporting *amici*, a remedy to a Title VII plaintiff who has proven a violation is not necessarily available in all cases. Rather, "backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." *Albemarle Paper*, 422 U.S. at 415.

As Title VII's remedial scheme is not mandatory, it is distinguishable from the Federal Employers' Liability Act, 45 U.S.C. § 51, which provides that a common carrier by railroad "shall" be liable for damages to persons injured while employed by such a carrier. *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35 (1961), thus is not relevant to the instant case. Similarly inapplicable are the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 904 ("Every employer 'shall' be liable. . .") and *Newport News Shipbuilding and Dry Dock Co.*, 674 F.2d 248 (4th Cir. 1982).

employees for only slight infractions soon would find itself with no experienced workers, no productivity, no profits, and an abundance of self-inflicted lawsuits. The Solicitor General's contention that employers nationwide are attempting to operate this way because of the after-acquired evidence doctrine is offensive and simply without any factual basis.

B. The After-Acquired Evidence Doctrine Is Consistent With the Court's Recent Decision in *ABF Freight System*.

For a number of reasons, the after-acquired evidence doctrine is consistent with the Court's recent decision in *ABF Freight System v. National Labor Relations Board*, 114 S. Ct. 835 (1994). In that case, unlike here, the employer failed to establish that it would have discharged the individual for a violation of a company policy. Moreover, the Court's sole reason for allowing relief to go forward was deference to an agency with special expertise—a factor not applicable to the ADEA, where all cases are heard before a court or jury.

In *ABF Freight*, the Board found that the employer had violated the Act by discharging several casual dockworkers and then offering to reinstate them if they would waive their right to pursue a grievance filed under the collective bargaining agreement. One of these casual workers, Michael Manso, returned to work, but then filed an unfair labor practice charge concerning the earlier terminations. Thereafter, Manso was discharged on the basis that he had violated the employer's disciplinary rules regarding tardiness.

The employer argued that Manso should not be reinstated because he had lied about the reasons for being late both to the employer and before the administrative law judge (ALJ). The Tenth Circuit enforced the Board's Order reinstating Manso. The court found substantial evidence to support the Board's finding "that ABF did not

meet its burden of showing that Manso would have been discharged in the absence of his protected union activity." *Miera v. National Labor Relations Bd.*, 982 F.2d 441, 446 (10th Cir. 1992), *aff'd sub. nom. ABF Freight System v. National Labor Relations Board*, 114 S. Ct. 835 (1994) (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983)) (employer bears the burden of proving that the employee would have been discharged absent any protected union activity).

This Court agreed that this crucial element was lacking. It noted that "[t]he Board found that the record in this case unequivocally established that ABF did not treat Manso's dishonesty 'in and of itself as an independent basis for discharge or any other disciplinary action.'" 114 S. Ct. at 838 n.5 (citing 304 N.L.R.B. 585, 590 (1991)). The Tenth Circuit had noted that "Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of anti-union animus. . . ." *Id.* at 838 (quoting 982 F.2d at 447). In contrast, after-acquired evidence cases require that the employer had a valid, enforceable company policy that was violated by the plaintiff.

Thus, this Court's ruling in *ABF Freight* was as narrow at the issue presented. The sole reason given for not reversing the Board was that the courts should defer to the administrative agency unless its ruling was "arbitrary, capricious, or manifestly contrary to the statute." 114 S. Ct. at 839. The Court could not say that the Board was obligated to adopt a rigid rule that would foreclose relief in all comparable cases. Although it appeared to be holding its nose in order to defer to the NLRB, the Court clearly discouraged the federal courts from giving sanction to proven misconduct.

Thus, the *ABF Freight* decision forcefully decreed that "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant

affront' to the truthseeking function of an adversary proceeding." *Id.* at 839. None of the numerous cases adopting the after-acquired evidence doctrine were criticized or even cited by the Court, and the *ABF Freight* decision in no way limits the authority of the federal courts to dismiss cases when the employer (unlike ABF Freight) can show that the employee would have been discharged for lying or breaching a valid company disciplinary policy.

Thus, *ABF Freight* closely resembles these cases cited above in which the courts, while recognizing the validity of the after-acquired evidence doctrine, declined to apply it in a particular case because of a failure of the employer's proof. In such a case, the applicability of the doctrine as a complete bar to relief is foreclosed. Nevertheless, the fact of the misconduct remains, and is still relevant to the determination of an appropriate remedy. *Accord Kristufek v. Hussman Foodservice Company*, 985 F.2d 364 (7th Cir. 1993) (holding that employer failed to show that employee would have been fired had the employer known of the falsified educational qualifications, but ordering verdict reduced to deduct damages and attorney's fees for the time following discovery of the falsification).

Indeed, this Court acknowledged in *ABF Freight* that the NLRB could have limited—or even denied—any remedy available to the employee:

We recognize that the Board might have decided that such misconduct disqualified Manso from profiting from the proceeding, or it might even have adopted a flat rule precluding reinstatement when a former employee so testifies. As the case comes to us, however, the issue is not whether the Board *might* adopt such a rule, but whether it *must* do so.

114 S. Ct. at 839 (emphasis in original). In the same manner, Justice Kennedy's concurrence confirmed the appropriateness of considering misconduct in granting a remedy:

[B]oth employer and employee have reason to insist upon honesty in the resolution of disputes within the workplace itself. And this interest, too, is not beyond the Board's discretion to take into account in fashioning appropriate relief.

114 S. Ct. at 840 (Kennedy, J., concurring).

Accordingly, while the Court in *ABF Freight* deferred to the NLRB's authority to craft an appropriate remedy, this in no way detracts from the authority of courts to arrive at an appropriate remedy in a case involving after-acquired evidence.

C. The Equal Employment Opportunity Commission Also Has Espoused the Doctrine, But Then Reversed Its Position.

The Solicitor General now contends that backpay can be *limited*—and reinstatement and front pay can be defeated entirely—based on after-acquired evidence even where discrimination has occurred. Br. at 23-25. The brief cites in support the *Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory* issued by the Equal Employment Opportunity Commission (EEOC), the federal agency having enforcement authority over the ADEA and Title VII. *Id.* at 26.

The Solicitor General's brief, however, fails to inform the Court that the Commission previously adopted the after-acquired evidence doctrine *in toto* as articulated in *Summers*, as a bar to all remedies. In March 1991, in the predecessor to the cited *Revised Enforcement Guide*, the EEOC issued guidance directing its own staff to take a strict *Summers* approach:

Where a plaintiff proves by direct evidence that discrimination was the exclusive basis for an employment decision, or where (s)he establishes that discrimination was a motive for the action, and the employer cannot prove that a legitimate motive would

have induced it to take the same action, then liability is established. At a minimum, the charging party is entitled to injunctive relief and attorney's fees. *However, in these circumstances, as in cases where discrimination is proved through circumstantial evidence, the employer may be able to limit other relief available to the plaintiff by showing that the after-the-fact lawful reasons would have justified the same action.*

For example, if a charging party is terminated for discriminatory reasons, but the employer discovers afterwards that she stole from the company, and it has an absolute policy of firing anyone who commits theft, *then the employer would not be required to reinstate the charging party or to provide back pay. . . . See, e.g., Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 48 EPD ¶ 38,543 (10th Cir. 1988) (plaintiff entitled to no relief where evidence that he falsified numerous company records was discovered after termination); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 33 EPD ¶ 34,185 (4th Cir.), cert. denied, 469 U.S. 832, 35 EPD ¶ 34,663 (1984) (while the airline's policy of not processing applications of persons over age 35 for the position of flight officer was a violation of the ADEA, the airline was not compelled to grant full relief to the plaintiff, since the airline proved that had it considered plaintiff's application, it would not have hired him on the basis of other lawful reasons); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994-5, 51 EPD ¶ 39,347 (D. Kan. 1989) (material omissions on plaintiff's employment application discovered after termination preclude relief on her Title VII claims).*

Even if the charging party is not entitled to individual relief, the Commission can lawfully seek relief for any other identifiable victims of the discrimination.

Policy Guidance on Recent Developments in Disparate Treatment Theory, N-915.063, EEOC Compl. Man.

(BNA) N:2129 at 2132-33 and n.17 (emphasis added).¹⁶ Under this guidance, then the Commission would not have sought any individual relief on behalf of a charging party where after-acquired evidence of application fraud showed that termination was inevitable.¹⁷

The Commission issued new guidance on July 14, 1992, in which it changed its position on after-acquired evidence:

[I]f the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be shielded from an order requiring it to reinstate the complainant or to pay the portion of back pay accruing after the date that the legitimate basis for the adverse action was discovered

Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, N-914.002, EEOC Compl. Man. (BNA) N:2135, N:2154.

The Commission gave no reason for its changed position, and did not even acknowledge that a change had occurred. Because it has taken inconsistent positions, EEOC's current pronouncement is entitled to no deference. *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

Moreover, the consequences of the Commission's new approach before this Court are alarming. Under the Commission's revised position, an employee who would have

¹⁶ The Commission's guidance notes that while it is intended to cover Title VII, "the same general principles apply to charges brought under the Age Discrimination in Employment Act." *Policy Guidance on Recent Developments in Disparate Treatment Theory*, N-915-063, EEOC Compl. Man. (BNA) N:2119.

¹⁷ Given the existence of this guidance, it is unclear why the Commission, signatory to the Solicitor General's brief, would state now that "The court erred in *Summers* . . .", Brief of Solicitor General at 14 n.6, and that the doctrine "ignores and obstructs the strong public policy goals of the ADEA and Title VII." Brief of Solicitor General at 16.

been discharged for misconduct had the employer known of it nevertheless would receive backpay for a period of time solely because the wrongdoing fortuitously went undiscovered. For example, if an employee who is laid off in a force reduction sues for age discrimination, and during a later audit is found to have embezzled money from company accounts, under the Commission's theory that employee may be entitled to backpay up until the date the embezzlement is discovered. This view converts Title VII and ADEA remedies into a reward for successfully concealing misconduct rather than simply providing a remedy for discrimination.

D. Public Policy Supports Application of the After-Acquired Evidence Doctrine as a Bar To All Remedies.

The after-acquired evidence doctrine, as applied by the Fourth, Sixth, Seventh, Eighth and Tenth Circuits, serves the remedial "make whole" purpose of federal antidiscrimination legislation by placing claimants in the position they would have been in had the discriminatory conduct not occurred, but not rewarding them for actively engaging in wrongdoing. In after-acquired evidence cases, the claimant has committed actual misconduct—providing false answers to legitimate job application questions, theft of confidential company documents, or falsification of records.¹⁸ To grant such an individual compensation such

¹⁸ The fact of actual misconduct distinguishes cases in which the after-acquired evidence doctrine applies from the hypotheticals suggested by Petitioner. For example, Petitioner contends that under the doctrine as currently applied, "an employer could avoid liability in a hiring case by showing that, at the time it rejected a qualified black applicant on account of race, there was a better qualified white available for the position, even though the white had never applied for the job and the employer only learned of his or her existence long after the black applicant had been rejected." Brief of Petitioner at 25-26. On the contrary, the after-acquired evidence doctrine is not used absent some type of active misconduct on the part of the employee.

as backpay rewards the employee for managing to conceal his misconduct from the employer.

As one court has pointed out, "every falsehood has two components, the prevarication itself and the underlying fact misrepresented or omitted. Either component could give cause for immediate termination." *Baab v. AMR Servs. Corp.*, 811 F. Supp. 1246, 1260 (N.D. Ohio 1993). Employers thus have two significant interests in receiving truthful answers from their prospective employees—one regarding the applicant's qualifications for the job, and the other regarding their fundamental honesty as a character trait.

An employee who misappropriates confidential company documents and goes undiscovered for a period of time already has profited once by his own wrongdoing. The argument that the employee should receive an additional monetary remedy for the period in which the employer was unaware of the theft would be an additional windfall, also at the employer's expense, because the employee succeeded in keeping that wrongdoing secret. Accordingly, this Court should adopt the after-acquired evidence doctrine as a complete bar to remedies in employment discrimination cases.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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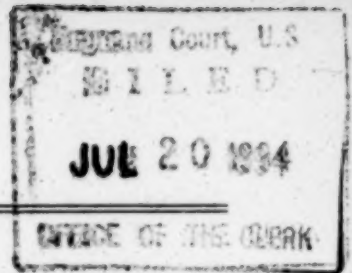
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No. 93-1543



In The
Supreme Court of the United States
October Term, 1994

CHRISTINE MCKENNON,

Petitioner,

v.

THE NASHVILLE BANNER PUBLISHING COMPANY,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

**BRIEF AMICI CURIAE OF THE NATIONAL
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ASSOCIATION OF TRIAL LAWYERS OF AMERICA
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QUESTION PRESENTED

Whether a new defense, with no basis in established law, premised upon the collateral misconduct of a victim of discrimination, should be created for employers accused of violating federal laws prohibiting employment discrimination.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Interest of Amici Curiae	1
Summary of Argument	1

POINT I

ESTABLISHED LEGAL PRINCIPLES PROHIBIT THE APPLICATION OF THE CLEAN HANDS AND IN <i>PARI DELICTO</i> DEFENSES AS THEY HAVE BEEN APPLIED IN THIS CASE UNDER THE GUISE OF THE SO-CALLED AFTER-ACQUIRED EVIDENCE DEFENSE	2
1. Application Of The Common Law Defenses Of Clean Hands And <i>In Pari Delicto</i> To Discrimination Cases Frustrates Congressional Intent And The Public Policy	4
2. There Is Not An Adequate Nexus Between Petitioner's Misconduct And Respondent's Illegal Behavior	10

POINT II

THE LEGISLATION AT ISSUE DOES NOT PROVIDE FOR THE AFTER-ACQUIRED EVIDENCE DEFENSE	14
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POINT III

THE CASELAW INTERPRETING AND ENFORCING THE FEDERAL ANTI-DISCRIMINATION LAWS AND POLICIES PROHIBITS THE AFTER-ACQUIRED EVIDENCE DEFENSE	15
Conclusion	18

TABLE OF AUTHORITIES

	Page
CASES	
<i>A.C. Frost & Co. v. Couer D'Alene Mines Corp.</i> , 312 U.S. 38 (1941)	3
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	9, 10, 15
<i>Baab v. AMR Serv. Corp.</i> , 811 F.Supp. 1246 (N.D. Ohio 1993)	5
<i>Bateman Eichler, Hill Richards, Inc. v. Berner</i> , 472 U.S. 299 (1985)	3, 6, 9
<i>Calloway v. Partners Nat'l Health Plans</i> , 986 F.2d 446 (11th Cir. 1993)	5
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 752 (1984)	7
<i>County of Washington v. Gunther</i> , 452 U.S. 161 (1981)	14
<i>EEOC v. Recruit U.S.A., Inc.</i> , 939 F.2d 746 (9th Cir. 1991)	4
<i>Everet v. Williams</i> (Ex. 1725)	3
<i>FTC v. Simplicity Pattern Co., Inc.</i> , 360 U.S. 55, reh'g denied, 361 U.S. 855 (1959)	14
<i>Great Atlantic & Pacific Tea Co., Inc. v. FTC</i> , 440 U.S. 69 (1979)	14
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	10, 15
<i>Hargett v. Delta Automotive</i> , 765 F.Supp. 1487 (N.D. Ala. 1991)	4
<i>Herman & MacLean v. Huddleston</i> , 459 U.S. 375 (1983)	4

TABLE OF AUTHORITIES – Continued

	Page
<i>Int'l Union, United Automobile, Aerospace, and Agric. Implement Workers of Am. OAW v. Johnson Controls, Inc.</i> , 499 U.S. 187 (1991)	14
<i>Keystone Co. v. Excavator Co.</i> , 290 U.S. 240 (1933)	11
<i>Kiefer-Stewart Co. v. Seagram & Sons, Inc.</i> , 340 U.S. 211 (1951), overruled on other grounds, 467 U.S. 752 (1984)	7
<i>Manufacturers Finance Co. v. McKey</i> , 294 U.S. 442 (1935)	3
<i>Massey v. Trump's Castle Hotel & Casino</i> , 828 F.Supp. 314 (D.N.J. 1993)	13, 16
<i>Milligan-Jensen v. Michigan Technological Univ.</i> , 975 F.2d 302 (6th Cir. 1992), cert. granted 113 S.Ct. 2991 (1993), cert. dismiss. 114 S.Ct. 22 (1993)	5, 13
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	16
<i>O'Driscoll v. Hercules, Inc.</i> , 745 F.Supp. 656 (D.Utah 1990), aff'd 12 F.3d 176 (10th Cir. 1994)	5, 13
<i>Oscar Mayer & Co. v. Evans</i> , 441 U.S. 750 (1979)	14
<i>Perma Life Mufflers, Inc. v. Int'l Parts Corp.</i> , 392 U.S. 134 (1968)	3, 5, 6, 7, 8
<i>Pieczynski v. Duffy</i> , 875 F.2d 1331 (7th Cir.), reh'g denied, 1989 U.S. App. LEXIS 10065	12
<i>Pinter v. Dahl</i> , 486 U.S. 622 (1988)	9, 10, 11
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	9, 14
<i>Shondel v. McDermott</i> , 775 F.2d 859 (7th Cir. 1985)	13
<i>St. Mary's Honor Center v. Hicks</i> , ___ U.S. ___, 113 S.Ct. 2742 (1993)	17, 18

TABLE OF AUTHORITIES – Continued

	Page
<i>Summers v. State Farm Mut. Auto. Ins. Co.</i> , 864 F.2d 700 (10th Cir. 1988)	2, 15, 16
<i>Trans World Airlines, Inc. v. Thurston</i> , 460 U.S. 111 (1985)	14
<i>Wallace v. Dunn Constr. Co., Inc.</i> , 968 F.2d 1174 (11th Cir. 1992)	13, 16
<i>Women Employed v. Rinella & Rinella</i> , 468 F.Supp. 1123 (N.D. Ill. 1979)	4
<i>Woods v. Ficker</i> , 768 F.Supp. 793 (N.D. Ala. 1991), aff'd without op., 972 F.2d 1350 (11th Cir. 1992)	4
STATUTES	
29 U.S.C. §600	14
29 U.S.C. §623(d)	15
29 U.S.C. §626(c)(2)	7
42 U.S.C. §1981a(c)(1)	7
42 U.S.C. §2000e et seq.	14
42 U.S.C. §2000e-3(a)	15
42 U.S.C. §12112(c)(1) and (2)	5
MISCELLANEOUS	
<i>Henry McClintock, Handbook of the Principle of Equity</i> , (2d ed. 1948)	3
<i>The Highwayman's Case</i> , 35 L.Q. Rev. 197 (1893)	3
<i>Zechariah Chafee Jr., "Coming Into Equity with Clean Hands,"</i> 47 Mich. L. Rev. 7 (1949)	3

INTEREST OF AMICI CURIAE

The National Employment Lawyers Association (NELA) is a national bar association with over 1,990 lawyer members in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. NELA was founded in 1985. Its members include most of the leading employment lawyers practicing law primarily on behalf of employees. NELA members have and continue to represent tens of thousands of victims of employment discrimination in federal and state courts. NELA members' clients will be significantly harmed, as will the public, if discriminating employers are given a special defense, with no basis in the law, which bars the claims or remedies Congress intended for discrimination victims.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association of approximately 50,000 members. ATLA members primarily represent plaintiffs seeking redress for personal injury or the deprivation of their rights under the law, as well as criminal defendants. ATLA views the decision below as inconsistent with the clear Congressional intent to protect the right of Americans to be free of discrimination in employment.

SUMMARY OF ARGUMENT

The after-acquired evidence doctrine adopted by the court below has no basis in law. First, the legislation does not provide for the defense. Second, the doctrine contravenes well-established caselaw interpreting the statutes in conjunction with the Congressional intent and public

policy underlying the statutes. Finally, the doctrine distorts and misapplies the common law defenses of clean hands and *in pari delicto* to discrimination claims when well-established principles prohibit such application.

In order to avoid redundancy, this brief will focus primarily on the application of common law defenses to discrimination cases with the understanding that the broad legislative interpretation and public policy issues will be thoroughly-briefed by petitioner and other amici.

POINT I

ESTABLISHED LEGAL PRINCIPLES PROHIBIT THE APPLICATION OF THE CLEAN HANDS AND *IN PARI DELICTO* DEFENSES AS THEY HAVE BEEN APPLIED IN THIS CASE UNDER THE GUISE OF THE SO-CALLED AFTER-ACQUIRED EVIDENCE DEFENSE

The after-acquired evidence doctrine applied by the Sixth Circuit below and originated by the Tenth Circuit in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), completely bars an employment discrimination action brought pursuant to the federal anti-discrimination statutes because of some collateral misconduct by the plaintiff. This new defense is not based upon the legislation, the purpose of the legislation, or the caselaw developed to interpret the statutes in accordance with the Congressional intent. See Points II and III, *infra*. Rather, this new defense is a distorted application of the common law defenses of "unclean hands" and *in pari delicto*.

The maxim that "he who comes into equity must come with clean hands," *Manufacturers Finance Co. v. McKey*, 294 U.S. 442, 451 (1935), may have first arisen in the case of a highway robber who was prohibited from suing his accomplice for his share of the fruits of their crimes. *Everet v. Williams* (Ex. 1725), described in Note, *The Highwayman's Case*, 35 L.Q. Rev. 197 (1893). The doctrine prohibits one who has engaged in unconscionable conduct with relation to the transaction involved in the suit from invoking the equitable powers of the court to enforce the requirements of good faith and fair dealing. See Henry McClintock, *Handbook of the Principle of Equity*, (2d ed. 1948); Zechariah Chafee Jr., "Coming Into Equity with Clean Hands," 47 Mich. L. Rev. 7 (1949). The common law doctrine of *in pari delicto* is the analogous principle in legal actions and provides a defense in an action for damages if the plaintiff has "been involved generally in 'the same sort of wrongdoing' as defendants." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307 (1985), citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138 (1968).

In cases in which the clean hands or *in pari delicto* defenses have been raised in response to private actions brought under federal statutes, those defenses have been limited or rejected entirely if the public interest is not served by allowing them. Thus, in *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 43 (1941), the Court analyzed the defenses Congress provided in the Securities Act of 1933 and the purpose of that Act in deciding whether the clean hands defense was available. Finding that application of the clean hands defense in

that case would frustrate rather than effectuate the purposes of the Act, the Court rejected the defense. Similarly, in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), the Court found that common law doctrines have "questionable pertinence" in cases brought under federal securities laws which were enacted "to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Id.* at 388-89.

1. Application Of The Common Law Defenses Of Clean Hands And In Pari Delicto To Discrimination Cases Frustrates Congressional Intent And The Public Policy

The availability of the clean hands or *in pari delicto* defenses to this case would clearly frustrate the purposes of the Age Discrimination in Employment Act.¹ If the

¹ A few courts have allowed these common law defenses in discrimination cases, without much analysis. *Women Employed v. Rinella & Rinella*, 468 F.Supp. 1123, 1129 (N.D. Ill. 1979) (allowing defense in *dicta* based on post-termination misconduct); *Hargett v. Delta Automotive*, 765 F.Supp. 1487, 1492-93 (N.D. Ala. 1991) (rejecting clean hands defense on the facts); *Woods v. Ficker*, 768 F.Supp. 793, 801-02 (N.D. Ala. 1991), *aff'd without op.*, 972 F.2d 1350 (11th Cir. 1992) (allowing clean hands defense in *dicta*).

However, The Ninth and Eleventh Circuits have thoroughly analyzed the availability of the clean hands defense in discrimination cases. In *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753-54 (9th Cir. 1991), the Ninth Circuit refused the defense against the EEOC, which violated statutory confidentiality rules, finding that the public interest in eliminating discrimination in employment outweighed the clean hands doctrine in that case. "[T]he

clean hands and *in pari delicto* defenses are appended to the law, an employer guilty of discrimination can completely evade the law's sanctions because of alleged collateral misconduct by plaintiff. Such a result ignores the public purposes of the anti-discrimination laws.² In *Perma Life*, 392 U.S. 134, the language and intent of the anti-trust

clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest." *Id.* at 753. In *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 450-51 (11th Cir. 1993), the Eleventh Circuit found that plaintiff's unclean hands (due to résumé fraud) had no nexus to the wage discrimination claim at issue and that defendant had not been injured by plaintiff's collateral misconduct. Having failed to meet those two requirements, defendant was precluded from employing the clean hands defense.

² The doctrine as it has been applied in many courts does not require any job-relatedness analysis. Therefore, it encourages employers to delve deeply into matters that are irrelevant or only remotely relevant to job performance. *See, O'Driscoll v. Hercules, Inc.*, 745 F.Supp. 656 (D.Utah 1990), *aff'd* 12 F.3d 176 (10th Cir. 1994) (employee misconduct: misleading statements on employment application forms regarding employee's age, ages of employee's children, whether employee had previously applied for employment with employer, name of a previous employer, date of high school graduation, and educational background); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S.Ct. 2991 (1993), *cert. dismissed*, 114 S.Ct. 22 (1993) (employee misconduct: a DUI conviction 5 years before hiring not divulged on employment application); *Baab v. AMR Serv. Corp.*, 811 F.Supp. 1246, 1255-56 (N.D. Ohio 1993) (employee misconduct: failing to accurately answer health-related questions that violate the Americans with Disabilities Act! 42 U.S.C. §12112(c)(1) and (2)). Increasing forays into issues of doubtful job-relatedness raise significant privacy concerns that affect the public as a whole.

laws were analyzed in detail, resulting in the Court finding that the *in pari delicto* defense was not available in that anti-trust case.

There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. . . . We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. . . . [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a wind-fall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart*, supra.

Id. at 138-39. See also, *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 308 (quoting *Perma Life*, 392 U.S. at 151) ("[Because] of the strong public interest in eliminating restraints on competition, . . . many of the refinements of moral worth demanded of plaintiffs by . . . many of the

variations of *in pari delicto* should not be applicable in the antitrust field.").

As noted in *Perma Life*, there may be other remedies available to defendants which will not frustrate the important public purpose of this federal legislation. An employer may have a counterclaim against an employee for fraud or theft, for example. Because Congress specifically provided that discrimination claims should be decided by juries, a complete bar or even a judicially fashioned limitation on remedies frustrates the express language of the Acts. 42 U.S.C. §1981a(c)(1); 29 U.S.C. §626(c)(2). A counterclaim, in which an employer can claim that it was wronged by an employee's misconduct, does not frustrate that Congressional goal or the Seventh Amendment. See also, *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), overruled on other grounds, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984):

If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

Some courts have relied on the concept that a plaintiff who misrepresented employment history or qualifications would not have been hired in the first place, so

there can be no injury consequent to an illegal termination. This logic ignores the *public* injury inherent in discrimination and distorts the law in a way that disfavors only discrimination victims. For example, a tippee (someone who receives and acts upon illegal insider information) is not precluded from suing a tipster for securities fraud. *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 317. Of course, if the tippee had not illegally acted on inside information the relationship between the parties would never have been created and the tippee would not have been harmed. But public policy implications precluded the *in pari delicto* defense. *Id.* Similarly, muffler dealers who voluntarily entered into a franchise agreement, that in many ways benefited them, were not precluded by *in pari delicto* from suing the franchisor for restraint of trade in violation of the Sherman and Clayton Acts. *Perma Life*, 392 U.S. 134.

This Court has developed a two-part test to determine when the *in pari delicto* defense is available. It is available

"only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Id.*, at 310-311. The first prong of this test captures the essential elements of the classic *in pari delicto* doctrine. *See id.*, at 307. The second prong, which embodies the doctrine's traditional requirement that public policy implications be carefully considered before the defense is allowed, *see ibid.*, ensures that the

broad judge-made law does not undermine the congressional policy favoring private suits as an important mode of enforcing federal securities statutes.

Pinter v. Dahl, 486 U.S. 622, 633 (1988).

Application of the two-pronged test to this case requires rejection of the *in pari delicto* defense. In regard to the second prong, the federal anti-discrimination statutes serve a public purpose at least as important as the public purposes underlying the federal securities and anti-trust laws, where the defense has been rejected.

Only in cases "in which the *statutory* goal of deterring illegal conduct is served more effectively by preclusion of suit than by recovery. . . . [should] the *in pari delicto* defense[] be afforded." *Pinter*, 486 U.S. at 634. The actions of the petitioner herein, and in almost all of the reported after-acquired evidence cases, do not even approach illegal conduct, much less conduct as repugnant to the public policy as discrimination. Indeed, the availability of the defense thwarts the Congressional policy of eradicating employment discrimination.

Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. . . . The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination."

Price Waterhouse v. Hopkins, 490 U.S. 228, 264-65 (1989) (O'Connor J., concurring) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

The primary objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The Act was intended by Congress to combat "historic evil of national proportions." *Albemarle Paper*, 422 U.S. at 416.

The faith in our judiciary of those most disenfranchised by the national shame of discrimination in our society will certainly suffer a severe blow if the moral purity demanded of them is greater than that required of those suing over securities or anti-trust violations.

2. There Is Not An Adequate Nexus Between Petitioner's Misconduct And Respondent's Illegal Behavior

Even if this Court deems the public purposes of the discrimination laws insufficient to limit defenses as they have been limited in securities and anti-trust cases, established principles outlining the parameters of the clean hands and *in pari delicto* defenses prohibit their application in this and in most other discrimination cases. The first part of the test adopted in *Pinter*, 486 U.S. 622, requires plaintiff's actual participation in the unlawful activity in order for the defendant to have available the *in pari delicto* defense:

Under the first prong of the *Bateman Eichler* test, as we have noted above, a defendant cannot escape liability unless, as a direct result of the plaintiff's own actions, the plaintiff bears at least substantially equal responsibility for the underlying illegality. The plaintiff must be an

active, voluntary participant in the unlawful activity that is the subject of the suit.

Id. at 635.

The clean hands defense likewise requires a direct nexus between plaintiff's conduct and the defendant's illegal conduct:

But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has *immediate and necessary relation* to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, *id.*, §100. Pomeroy, *id.*, §399. They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933).

The Seventh Circuit has stressed the nexus required in order to sustain the clean hands or *in pari delicto* defenses in wrongful termination cases based upon the First Amendment. Those cases require a strong public policy militating against the relief sought by a plaintiff in order to allow the defenses.

A discharge does not violate the First Amendment even though the only reason for the discharge is political, if reinstatement or the other relief requested would violate strong public policy, for example as embodied in state criminal prohibitions of "ghost employment" (which means being on the public payroll without doing any work). *Byron v. Clay*, *supra*, 867 F.2d at 1051-52. To that extent – but to that extent only – there is a defense of "unclean hands" (if equitable relief is sought) or "*in pari delicto*" (if legal relief is sought). But the mere fact that valid grounds exist for discharging the worker will not excuse the employer if, had it not been for the worker's political beliefs, he would not have been discharged.

Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989) *reh'g denied*, 1989 U.S. App. LEXIS 10065 (7th Cir. 1989).

Similarly, in refusing the clean hands defense to city officials sued by discharged city employees who claimed that their discharges were politically motivated, the Seventh Circuit found that one plaintiff's alleged Hatch Act violations (illegal political activities by a government employee) were not connected sufficiently to the wrongful termination claims to allow the defense. The Court held:

Unless courts insist on a tight connection between the object of the injunction and the misconduct of the plaintiff, suits for injunction will bog down in all sorts of collateral inquiries. In this age of legalism, when relatively few plaintiffs are wholly free from any trace of arguable misconduct at least tangentially related to the objective of their suit, the right to injunctive

relief, especially to preliminary injunctive relief, would have little value if the defendant could divert the proceeding into the byways of collateral misconduct.

Shondel v. McDermott, 775 F.2d 859, 869 (7th Cir. 1985).

The petitioner's misconduct in this case is so collateral that it cannot arguably be connected to the age discrimination of respondent. Similarly, in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S.Ct. 2991 (1993), *cert. dismissed*, 114 S.Ct. 22 (1993), the plaintiff's omission of a DUI conviction (5 years earlier) on her employment application for a security guard job was found to preclude a lawsuit seeking redress for particularly crude and obvious sex discrimination. In fact, in most reported discrimination cases there is absolutely no nexus between the employee's misconduct and the employer's illegal behavior. See *Massey v. Trump's Castle Hotel & Casino*, 828 F.Supp. 314 (D.N.J. 1993) (plaintiff suing for race discrimination in a failure to promote case failed to notify discriminating employer that he had been terminated from a police department 16 years earlier for misplacing his gun); *Wallace v. Dunn Constr. Co. Inc.*, 968 F.2d 1174 (11th Cir. 1992) (employee omitted conviction for possession of cocaine and marijuana on employment application); *O'Driscoll v. Hercules, Inc.*, 745 F.Supp. 656 (D.Utah 1990), *aff'd* 12 F.3d 176 (10th Cir. 1994) (employee misrepresented on application forms the ages of her children, the date of her high school graduation, the fact that she had previously applied for a job with the employer, and her educational background.)

Thus, established precedent prohibits allowing discriminating employers an absolute defense based upon collateral misconduct by plaintiffs.

POINT II

THE LEGISLATION AT ISSUE DOES NOT PROVIDE FOR THE AFTER-ACQUIRED EVIDENCE DEFENSE

There is no basis for the after-acquired evidence defense in the plain language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, or the Age Discrimination in Employment Act, 29 U.S.C. §600.³ The judiciary "cannot supply what Congress has studiously omitted." *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 67 *reh'g denied*, 361 U.S. 855 (1959); *See also, Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 79 (1979). This Court has declined to judicially create affirmative defenses that are absent from the discrimination laws. *Int'l Union, United Automobile, Aerospace, and Agric. Implement Workers of Am. OAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210, 214 (1991); *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981). The Court should not accept respondent's invitation to legislate here.

³ This Court has held that the standards of proof, methodology, and defenses available under cases brought pursuant to the ADEA are the same as those brought pursuant to Title VII. *See Price Waterhouse*, 490 U.S. at 292; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 & n.16 (1985); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1979).

POINT III

THE CASELAW INTERPRETING AND ENFORCING THE FEDERAL ANTI-DISCRIMINATION LAWS AND POLICIES PROHIBITS THE AFTER-ACQUIRED EVIDENCE DEFENSE

The law established by this Court interpreting Title VII (and, by analogy, the ADEA) requires employers to make victims of employment discrimination "whole" and notes the strong federal policy against employment discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

The doctrine at issue in this case is contrary to the established caselaw. It actually allows employers to discriminate with impunity. After an intensive investigation into almost any employee's history and work record some collateral misconduct is sure to emerge.

Indeed, the *Summers* doctrine promotes retaliation against employees who charge their employers with discrimination. The first stage of the retaliation is an exhaustive search for some indiscretion – no matter how long ago or remote to the issues at hand – while employees who do not complain about discrimination are not subject to such investigation. The second stage of the retaliation is the employer's actual or theoretical *post hoc* termination only of the employee who complained of discrimination while other employees who have engaged in similar misconduct are not terminated. Not only is such retaliation not sanctioned by the statutes and established caselaw, it is specifically illegal. 29 U.S.C. §623(d) and 42 U.S.C. §2000e-3(a).

The *Summers* court relies primarily on a misreading of the ruling in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) in fashioning the after-acquired evidence defense. This Court ruled in *Mt. Healthy* that a school board could avoid liability for failing to rehire a teacher in violation of the First Amendment if it proved that it would have taken the same action for completely independent grounds known at the time. *Id.* at 285-86.

As noted by at least one court, the *Summers* rule contradicts *Mt. Healthy*:

[T]he *Summers* rule clashes with the *Mt. Healthy* principle (adapted for use in statutory discrimination cases) that the plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice.

Wallace v. Dunn Constr. Co., Inc., 968 F.2d 1174, 1179 (11th Cir. 1992) (citing *Mt. Healthy*, 429 U.S. at 285-86).

Additionally, *Mt. Healthy* cannot be extended in a way that contradicts the actual statutes, as amended, or thwarts Congressional intent.

In another fiction, the *Summers* court reasons that a plaintiff guilty of collateral misconduct is not "injured" by illegal discrimination because he/she would have been fired if the employer knew of the collateral misconduct. This analysis has no basis in law. It is articulately refuted by the court in *Massey v. Trump's Castle Hotel & Casino*, 828 F.Supp. 314 (D.N.J. 1993):

It is problematic at best to say that there has been no injury in the face of proven illegal

conduct. The after acquired evidence cases are not equivalent to the mixed-motive cases upon which they rely. In a mixed-motive case, the employer had more than one reason for its employment decision, and that decision would not have been changed if the illegal motives were removed. In the after acquired evidence cases, however, the employment decision was based solely on illegal grounds. Absent those illegal motives, the employee would still be employed. Thus, an illegal discharge causes an injury regardless of an employee's previous misconduct, and that injury must be subject to some redress.

Id. at 322 (footnote omitted).

Moreover, the concept that collateral misconduct by a plaintiff can act as a complete defense for a discriminating employer conflicts with the principles outlined in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993). In *Hicks*, the Court determined that a plaintiff does not necessarily prevail in an employment discrimination case simply by proving that an employer's proffered reasons for termination are untrue. "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Hicks*, 113 S.Ct. at 2751.

Thus, even where an employer has committed perjury by falsely stating its reasons for an adverse employment action against plaintiff, the employer is not

precluded from prevailing on the merits.⁴ The employer's wrongdoing in this respect has no determinative effect upon the litigation. Rather, plaintiff must prove his or her case showing, through a preponderance of the evidence, "that the employer's action was the product of unlawful discrimination." *Id.*

To allow the use of the after-acquired evidence defense to bar recovery by plaintiff where intentional discrimination has been found is thus antithetical to the holding of *Hicks*, as well as the entire body of discrimination law this Court has produced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the clean hands and *in pari delicto* defenses should not be distorted in order to develop a special defense for employers who violate federal anti-discrimination laws. The important federal public policy underlying the discrimination laws prohibits application of the clean hands

⁴ As noted by the Court in *Hicks*: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *Id.* at 2754. Similarly, employers who are allegedly wronged by employee misconduct have civil and criminal remedies available to them. See POINT I, *supra*.

and *in pari delicto* defenses just as the securities and anti-trust laws prohibit their application.

Respectfully submitted,

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